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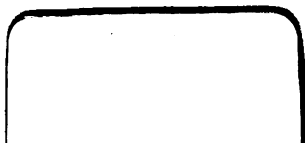
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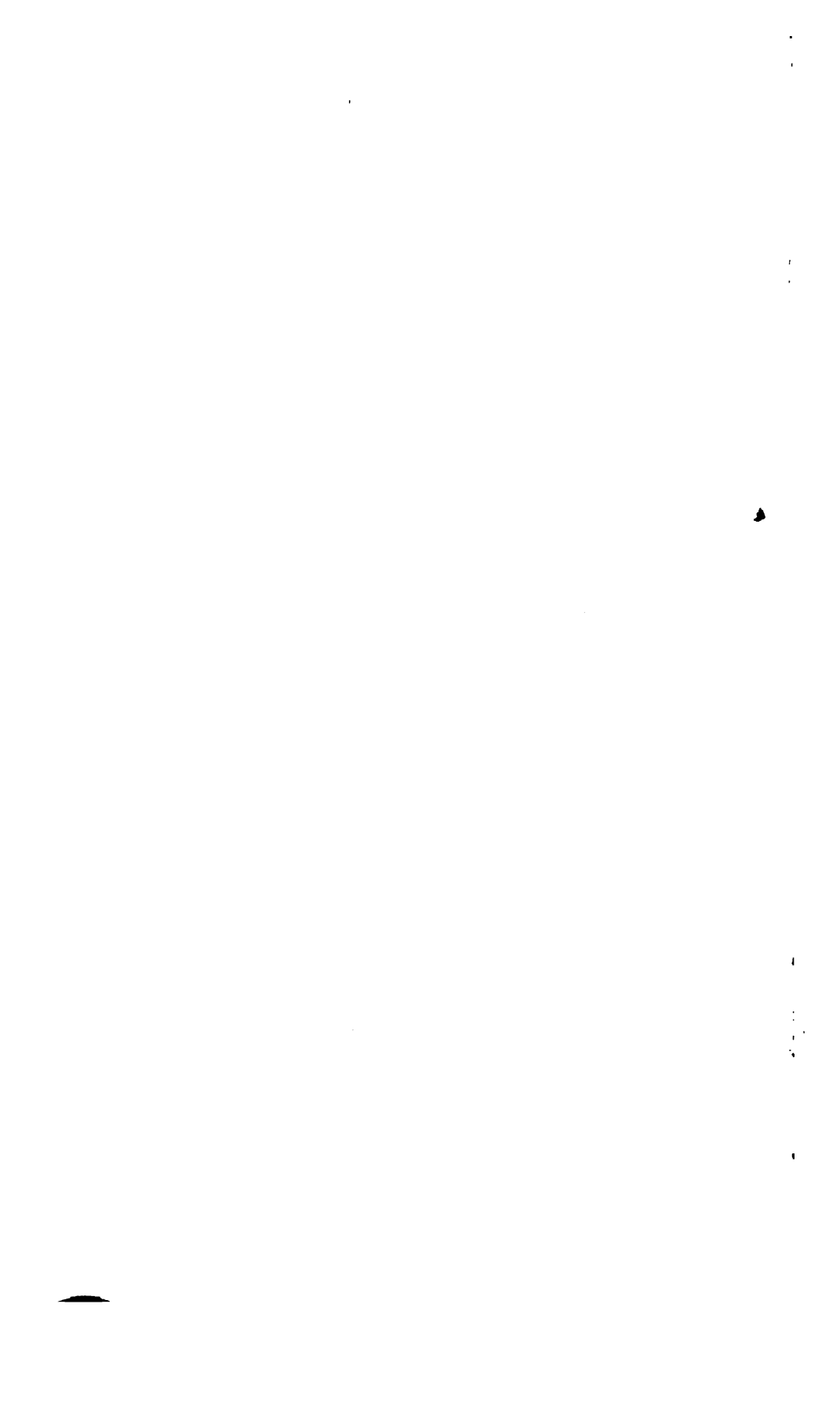
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F. D. Hubbell

A

SUMMARY
OF THE
LAW AND PRACTICE
OF
REAL ACTIONS;

WITH

AN APPENDIX OF PRACTICAL FORMS.

BY ASAHEL STEARNS.

**NIHIL ENIM HABEMUS OPTATIUS, QUAM UT IN HOC STUDII GENERE,
LABORES TUOS TIBI REDDAMUS TUM TUTOS, TUM FACILES.**

Prol. Reg. Brev.

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PREFACE.

THE difficulty of acquiring a competent knowledge of the *Law and Practice of Real Actions*, from the books in common use, is felt by every student. And a modern treatise, which should explain the nature and principles of these *ancient remedies*, their form and structure, with the *pleadings and evidence applicable to each*, has been long considered "*a desideratum in the science of jurisprudence.*"* It is chiefly owing to the difficulty of preparing such a treatise, that it has been hitherto declined by abler hands. And perhaps the attempt now made by the author of the ensuing pages may be thought to require an apology, instead of giving him a claim to the indulgence or the thanks of the profession.

In common with others, he has felt the want of that assistance, which it is the object of his present undertaking to afford. Soon after he took charge of the *Law Department in the University*, with a view to remove some of the difficulties experienced by his pupils, he drew up a short course of Lectures upon the Law and practice of Real Actions, the *apparent* utility of which more than equalled his expectations. The favourable opinion of several learned friends, and the partiality of some of his pupils, led them to express a desire that those Lectures should be made public. To their wishes he has yielded; and they now constitute the substance of the ensuing treatise, which is submitted to the profession, with the hope that it may in some measure supply the want which has been alluded to.

* See 2 Wheat. R. 315.

Designed chiefly for the use of *students*, and the younger members of the bar, the author has endeavoured to make it an *elementary*, as well as a *practical work*. In the *Introduction* he has stated and explained at some length, and with as much clearness and precision as he was able, some of the fundamental principles of the Law of Real Property. He has also attempted, (with how much success others must decide,) to introduce method and arrangement into this department of the law, in which they have been hitherto very little regarded. And however defective the plan or the execution may be, he flatters himself that the attempt will not be wholly useless. A change of the order in any department of science seldom fails to suggest, even to the learned reader, some views of the subject, which, under a different arrangement, might have escaped his notice.

Strict method has nevertheless been made to yield to considerations of utility. And in some instances a statement or remark has been repeated, to avoid the inconvenience of referring the student to another part of the work, when a short explanation seemed necessary.

A large portion of the ancient proceedings in Real Actions having become obsolete in our courts, considerable embarrassment was felt, as to the course proper to be pursued. It was supposed that some account of those proceedings, in the early times of the English law, would be desired and expected by the student. And that their having fallen into disuse in our practice, would not generally be considered a sufficient reason for omitting to notice them. Upon this point, it is highly probable different opinions may be entertained. By some it may be thought that too large a portion of the work had been devoted to the explanation of the ancient law and practice; while others may perhaps consider them deserving of more attention than they have received.

In the execution of his task, the author has aimed at something more than a mere collection of cases. He has attempted to analyse, to examine, and to apply to our practice, the ancient principles and doctrines of the law; and to present to the student, in as clear and intelligible a manner as he could, as much useful information as possible in a small compass. No endeavours have

been wanting on his part, to render the work useful to the profession, especially to the *younger* members of the bar.

In discussing so many difficult subjects, he cannot expect to have wholly escaped from errors. But he has followed the best lights he could obtain, by no inconsiderable research, and a careful examination of the authorities to which he has referred. For the mistakes into which he may have fallen, he trusts that he shall find some apology, in the acknowledged difficulty of the undertaking.

The manifest defects of the *precedents* of Real Actions, now in common use, are familiar to every lawyer. In many of them the forms of different actions are so blended, that it is not easy to decide to which class they belong. To supply this defect the author has, without hesitation, had recourse to the precedents in the Register, and Rastell; the conciseness and technical accuracy of which are too well known, to require any commendation. And they have been no farther altered, than was necessary to accommodate them to the changes which we have made in the ancient practice. In the forms of *pleas* and *replications* he has availed himself of the same aid as far as he could, and has supplied the deficiency from other sources in the best manner he was able.

It was originally the intention of the author to include in this volume some remarks upon the kindred subjects of *Waste, Partition, and Forcible Entry and Detainer*. Materials were prepared for that purpose, and a reference to one of those subjects was made in page 21. But he afterwards thought it more prudent, not to extend his work beyond the objects necessarily embraced by the title, while it remained uncertain how far his labors would prove acceptable to those, for whose use they were designed.

Harvard University, September, 1824.

ANALYTICAL TABLE OF CONTENTS.

INTRODUCTION.

- SECT. 1.** Ceremonies in the transfer of real property—originally by feoffment and entry. 1.
- SECT. 2.** Seisin defined: is either in *fact*, or in *law*. 1.
- SECT. 3.** Seisin in fact is rightful or wrongful.—Rightfully acquired by feoffment and entry. 3.
- SECT. 4.** Seisin in fact is wrongfully acquired by disseisin. 4.
- SECT. 5.** Disseisin may be by a wrongful entry, or the wrongful act of a person rightfully in possession. 7.
- SECT. 6.** Disseisin by particular tenants.—When and how it incurs a forfeiture. 8.
- SECT. 7.** What conveyances may work a disseisin, and their operation. 9.
- SECT. 8.** Conveyances construed with great indulgence by our law.—Acknowledgment and recording a deed, when equivalent to *livery of seisin*. 12.
- SECT. 9.** Seisin and disseisin strictly only of real and corporeal property.—It may be either actual, or at the election of the party disseised. 15.
- SECT. 10.** Entry when necessary to require or regain the seisin. In what cases an actual entry not required, to give a *seisin in deed*. When entry cannot be made with personal safety, the party may make claim. 18.
- SECT. 11.** Effect of an entry generally determined by the intention of the party. Entry to regain the seisin, or for other purposes, should be peaceable. Forcible entry and its consequences. 21.

- SECT. 12. Entry for condition broken, by whom, when, and how made. Entry for non-payment of rent: and effect of an entry in defeating an estate. 24.
- SECT. 13. Of the seisin required to *convey* lands, and to transmit them by *devise* or *descent*. 29.
- SECT. 14. Entry by a mortgagee or assignee of a mortgage, to obtain the possession, or to foreclose the mortgage. 38.
- SECT. 15. Seisin how, and to what extent, acquired or lost in certain cases. 42.
- SECT. 16. Seisin and disseisin of tenants in common and joint-tenants. 44.
- SECT. 17. Effect of an entry, when the lands are in the same, or different counties, or in possession of different persons, and when one enters to the use of another. 45.
- SECT. 18. What act may be deemed an entry, and the usual ceremony of making it. 46.
- SECT. 19. Necessity of an actual entry generally, superseded by the fictions adopted in Ejectment. 49.

CHAPTER I.

OF THE REMEDIES FOR INJURIES TO REAL PROPERTY, WHICH
AMOUNT TO AN OUSTER.

- SECT. 1. The several injuries which amount to an *ouster*. 52.
- SECT. 2. Ancient law of Real Actions obsolete in England: a new remedy by Ejectment introduced. 54.
- SECT. 3. Circumstances which led to the introduction of the action of Ejectment. 55.
- SECT. 4. Remedy by Ejectment for a long time defective and inconvenient. Difficulties removed by adopting a series of fictions. 56.
- SECT. 5. Great diversity of practice in this country, as to these remedies. 59.
- SECT. 6. Simplicity and convenience of the practice adopted in Massachusetts. 60.
- SECT. 7. Remedy in cases of *ouster*. It is either by entry, or by action. 63.
- SECT. 8. In what cases an entry is lawful: and when *toll*ed or lost. 64.

- SECT. 9. Right of entry how affected by a Discontinuance. 69.
- SECT. 10. how by Deforcement. 72.
- SECT. 11. In what case a party may enter, where he cannot maintain an action. 73.
- SECT. 12. In what cases an entry is an *effectual remedy*, and where it is of no avail. 75.
- SECT. 13. A momentary seisin, acquired by an entry, may in some cases change the remedy, and give the party a different writ of Entry. 76.
- SECT. 14. In proceedings by Ejectment it has no such effect. 78.
- SECT. 15. Difference between real and personal actions, as to the *conclusiveness* of the judgment. 79.
- SECT. 16. In real actions the judgment is a bar to other actions of the *same*, but not to those of a *higher* grade. 80.
- SECT. 17. In Ejectment a former judgment is no bar, and why. 81.

CHAPTER II.

OF REAL ACTIONS, AND THEIR INCIDENTS.

- SECT. 1. REAL ACTIONS in general—their nature, and in what cases the proper Remedy. 83.
- SECT. 2. Where, when, and against whom a Real action may be brought. 85.
- SECT. 3. PROCESS in Real actions by the *ancient law*. 87.
- SECT. 4. PROCESS and proceedings in *our practice*. 88.
- SECT. 5. ESSOINS and their consequences. 90.
- SECT. 6. SUMMONS AND SEVERANCE, when necessary. 93.
- SECT. 7. AID-PRAYER and RECEIT. 95.
- SECT. 8. IMPARLANCE and its consequences. 98.
- SECT. 9. PAROL-DEMURRER, when allowed or disallowed. 99.
- SECT. 10. VIEW by the ancient law, and in England. 102.
- SECT. 11. VIEW when allowed, and how conducted in *our practice*. 105.

CHAPTER III.

OF WARRANTY—COVENANTS—VOUCHER.

- SECT. 1. WARRANTY of feudal origin. Mutual obligation of Lord and Tenant. 109.

X ANALYTICAL TABLE OF CONTENTS.

- SECT. 2. SUBINFEUDATION. Its effects in restricting warranty. Statute of *Quia emptores* and its consequences. 112.
- SECT. 3. Restricted operation of this statute. Express and implied warranty. Operation of the words GIVE, GRANT, &c. in conveyances of freehold estates. 114.
- SECT. 4. Ancient law respecting estates for years. Lessee considered a bailiff of lessor. EXPRESS AND IMPLIED COVENANTS in leases for years. These COVENANTS differ from a warranty. 115.
- SECT. 5. The statute of *Quia emptores* put an end to implied feudal warranty. EXPRESS WARRANTY introduced. Not confined to *feoffments*, like implied warranty. 117.
- SECT. 6. REBUTTING the grantor. VOUCHING—SUMMONS AD WARRANTIZANDUM—COUNTERPLEADING to voucher and to warranty. *Summons ad warrantizandum, quia timet—Praying in aid.* 118.
- SECT. 7. ACTION OF COVENANT superseded voucher. Remedy more extensive—Causes of this change. Effect of the ancestor's warranty to rebut the heir, *with or without assets.* 121.

CHAPTER IV.

OF WRITS OF ENTRY AND THE PROCEEDINGS THEREIN.

PART I.

The several kinds of writs of Entry, and their application as legal remedies.

- SECT. 1. STRICTNESS of the ancient law, as to form. Great variety of Writs in Real actions. 125.
- SECT. 2. WRITS OF ENTRY when introduced. Their nature. Sometimes changed to WRITS OF RIGHT, and *vice versa*. Of two classes, according to the rightful or wrongful origin of the tenant's seisin. 126.
- SECT. 3. They are of four kinds, according to the origin of the injury complained of. 131.
- SECT. 4. What particulars to be stated in a writ of Entry. 132.
- SECT. 5. ENTRY IN THE QUIBUS most common in practice. Lies for the freehold or inheritance. 138.

- SECT. 6.** Extensive application of the writ of Entry in the *QUIBUS*, illustrated by several examples. 142.
- SECT. 7.** ENTRY in the *PER* by whom, and when it may be maintained. 147.
- SECT. 8.** ENTRY in the *PER* and *CUI*, by whom and when maintained, and what constitutes a degree. 149.
- SECT. 9.** ENTRY in the *Post*, by whom and when brought. Used in suffering a common recovery. Its application is extensive in practice. 150.
- SECT. 10.** Of the Remedies in some cases of ABATEMENT and INTRUSION. 152.
- SECT. 11.** Remedies for withholding the possession, where a rightful estate has expired, or been defeated. 156.
- SECT. 12.** Ancient remedy by *Assize of Novel Disseisin*. 161.
- SECT. 13.** In what cases generally a writ of Entry may be maintained. 164.
- SECT. 14.** Who must join in writs of Entry. Effect of inability, and practical cautions. 169.
- SECT. 15.** FORM of the process. Bail. *Service* on whom to be made. *Waste* pending the action. 174.
- SECT. 16.** Precautions to be attended to in practice, as to *proper parties*; &c. 175.

CHAPTER IV,—PART II.

Pleadings, Evidence, Verdict, and Judgment, in writs of Entry.

- SECT. 17.** *Pleas in abatement—Alienage—Non tenure—Joint-tenure—Sole or entire tenure—Several tenure. Disclaimer.* 178.
- SECT. 18.** *Pleas Puis darrein continuance—Entry—Marriage—Death of demandant—Filing pleas, &c.* 187.
- SECT. 19.** *Pleas in bar—Non Disseisin—Non tenure—Disclaimer.* 192.
- SECT. 20.** *Plea “that demandant has conveyed to a stranger.”* Several other pleas. 197.
- SECT. 21.** *Plea of the settlement and betterment act, and its effects.* 201.

- SECT. 22. What *admitted* by pleading the general issue. What may be given in evidence under it, or pleaded *puis darrein continuance*. *Presumptions*. *Statute of Limitations*. 205.
- SECT. 23. *The verdict and Judgment* in writs of entry. Writ of *Habere facias seisinam*, and how executed. 217.

CHAPTER IV,—PART III.

- SECT. 24. *Sketch* of the origin and nature of mortgages. Jurisdiction of Chancery. Many inconveniences, which exist in England, are avoided by our law. 222.
- SECT. 25. *By whom*, and in *what cases*, a writ of Entry to foreclose a mortgage may be maintained. 226.
- SECT. 26. *Against whom* such a writ may be brought, and what may be pleaded thereto. 233.
- SECT. 27. Of the *Judgment* in an action to foreclose. 238.
- SECT. 28. *Writ of Entry* by an *Executor or Administrator*, to recover real property set off on execution. 243.

CHAPTER V.

WRITS OF DOWER.

- SECT. 1. Several kinds of dower at common law. Only one in our practice. Who is entitled to dower. 246.
- SECT. 2. What estate in the husband is necessary, to entitle the wife to dower. 250.
- SECT. 3. Of the requisites to complete the wife's title to dower. Actual seisin not required. Marriage. Death of the husband. 256.
- SECT. 4. *Alienage* and *attainder*, and their effects as to dower. 259.
- SECT. 5. How the wife may *debar* herself of dower. 261.
- SECT. 6. The several methods which have been adopted to *prevent* dower. 266.
- SECT. 7. *Assignment of dower* by the Courts of Probate. 268.
- SECT. 8. *Proceedings* in the Courts of law to obtain dower. *Demand—Writ—Count—Service, &c.* 271.

- SECT. 9. *Pleas in dower, in abatement, and in bar.* 274.
 SECT. 10. *Judgment in dower, and damages against the heir or alienee of the husband.* 281.
 SECT. 11. *Writ of seisin of dower, and how executed.* 287.

CHAPTER VI.

WRITS OF FORMEDON.

- SECT. 1. *Of writs of Formedon generally.—Their application and incidents.* 291.
 SECT. 2. *Formedon in the descender.* Count, pleas, &c. 295.
 SECT. 3. *Formedon in the reverter.* 302.
 SECT. 4. *Formedon in the remainder.* 304.
 SECT. 5. *Of the pleadings, judgment, and execution in Formedon, and how far conclusive, &c.* 307.
 SECT. 6. *Remarks upon this remedy. It is fallen into disuse, and is perhaps no longer necessary to be continued.* 310.

CHAPTER VII.

WRITS OF RIGHT.

- SECT. 1. *Ancient writ of Right, how and where commenced. Modern practice in the English courts. General writ of right adopted in our practice.* 314.
 SECT. 2. *By and against whom a writ of Right may be brought. When after the demandant has failed in a writ of Entry. Limitation of the action.* 319.
 SECT. 3. *Count in the writ of Right. What seisin required, and how stated. Title by descent, how deduced in a writ of Right.* 324.
 SECT. 4. *Pleading in abatement, aid-prayer, and pleading in chief.* 329.
 SECT. 5. *Different modes of Trial. Practice adopted in our Courts.* 333.
 SECT. 6. *The evidence in a writ of Right.* 338.
 SECT. 7. *Verdict and judgment in a writ of Right. Writ of seisin, costs, &c.* 342.

CHAPTER VIII.

ACTION OF TRESPASS FOR THE MESNE PROFITS.

- SECT. 1. *Of the damages recovered by the ancient law, in writs of Assize and writs of Entry.* 346.
- SECT. 2. *Introduction of the action of Trespass for the mesne profits, after the recovery in Ejectment; and the circumstances which led to its being applied in the same manner, after a recovery in a writ of Entry.* 353.
- SECT. 3. *Action for the mesne profits, when maintainable after a recovery in Ejectment.* 357.
- SECT. 4. *When maintainable, after a recovery in a writ of Entry, or other Real action.* 361.
- SECT. 5. *The damages in an action for the mesne profits.* 372.

PRACTICAL FORMS.

WRITS OF ENTRY IN THE *QUIBUS*.

1. Upon the seisin of the Demandant, who claims a *fee simple*. 377.
2. Upon the seisin of the demandant, who claims an estate *for life*. 377.
3. Upon the seisin of Husband and Wife in *fee simple*. 378.
4. Upon the seisin of the Wife *for life*, while *sole*. 378.
5. Upon the seisin of Demandant's Father *in fee*. 379.
6. By Children and Grand Children, upon the seisin of their Ancestor. 380.
7. By the Mother, Brothers, and two Nephews who are *infants*, and sue by their *Prochein ami*. 381.
8. Upon the seisin of the Mother, Tenant *pur auter vie*. 382.
9. By a Minister, upon the seisin of his Predecessor. 382.

ENTRY SUR DISSEISIN IN THE *PER*.

10. Upon the Demandant's own seisin *in fee*. 383.
11. Upon the Demandant's own seisin *for life*. 383.
12. By a corporation. 384.
13. Upon the seisin of the Demandant's Brother, for one moiety. 384.
14. Upon the seisin of the Demandant's Father, Tenant *pur auter vie*. 385.
15. By a Rector upon his own seisin, in right of his Church. 386.

ENTRY SUR DISSEISIN IN THE *PER* AND *CUI*.

16. Upon the Demandant's own seisin *for life*. 386.
17. Upon the seisin of the son of the Demandant. 387.
18. By Husband, Tenant by the Curtesy. 387.
19. By a Minister upon his own seisin. 388.

ENTRY SUR DISSEISIN IN THE *POST*.

20. Upon the Demandant's own seisin *in fee*. 389.
21. By Husband and Wife, upon the seisin of the Wife's Mother. 389.
22. By two Children and two Grand Children, upon the seisin of their ancestor. 390.
23. Against a Corporation, upon the seisin of the Demandant's Brother. 391.
24. By Proprietors of Lands, Wharves, &c. held in common. 392.

-
25. Against one who entered by *Abatement*, after the death of the Demandant's Brother. 392.

ENTRY SUR INTRUSION.

26. Against the Intruder, after the death of Tenant in Dower. 395.
27. By two Heirs, in the *Per*, after the death of Tenant by the Curtesy. 396.
28. In the *Post*, after the death of the Demandant's Lessee for life. 397.
29. In the *Post*, by Assignees of the Reversion, after the death of *Cestui que vie*. 398.

-
30. ENTRY *ad communem legem*, in the *Per*, by the Heir, after the alienation of Tenant in Dower. 399.
 31. Entry *ad terminum qui præterit*, in the *Per*, by the Heir of the Lessor. 400.
 32. Same, in the *Per* and *Cui*, by the Lessor. 401.
 33. Same, in the *Post*, by the Assignee of the Reversion. 401.

WRITS OF ENTRY TO FORECLOSE MORTGAGES.

34. By Mortgagee, alleging a seisin in fee and in mortgage. 402.
35. By Executor or Administrator, against one who entered in the life time of the Testator or Intestate. 403.

36. Same, against one who entered after the death of the Testator or Intestate. 403.
37. By a mortgagee, setting forth the Deed, with a *profert*. 404.
37. a. By an assignee of mortgagee, setting forth the Deeds of Mortgage and assignment with *profert*. 405.
37. b. By Mortgagee against Mortgagor, setting forth the deed of Mortgage, and the Condition. 406.

PLEAS IN BAR.

38. That the Mortgage was *usurious*. 407.
39. *Payment or Tender*, after breach of the Condition. 409.

WRIT OF ENTRY FOR LAND SET OFF ON EXECUTION.

40. Entry by an Executor or Administrator, for Lands set off to him on Execution. 410.

AID PRAYER AND RECEIT.

41. *Prayer of Aid*, by a Tenant by the Curtesy. 410.
- 41, a. *Summons ad auxiliandum*, in a writ of Right. 411.
42. *Prayer* to be received to defend, &c. 412.

-
43. *Oath* of the Sheriff upon *View* by the Jury. 413.
-

44. *Summons ad warrantizandum*. 413.

PLEAS IN ABATEMENT IN WRITS OF ENTRY.

45. *Alienage* of the Demandant. 414.
46. *General Non-tenure* to the writ. 414.
47. *Special Non-tenure* to the writ. 415.
48. *General Non-tenure* to a moiety, and the general issue to the Residue. 415.
49. *Replication* to the Plea of Non-tenure, taking issue. 416.
50. *Joint-tenure* to the writ, with a *profert* of the Deed. 416.
51. *Replication* to the above plea, taking issue. 417.

52. Plea that the demandant is *Joint-tenant* with another, not named in the Writ. 417.
53. *Disclaimer* by one tenant, and the other takes the *Entire-tenure*, and pleads the general issue. 418.
54. *Replication* to the last plea, taking Issue. 418.
55. Two tenants plead *severally*, *non-tenure* with a *disclaimer*, as to each other's part, and *several-tenure* to the residue. 419.
56. *Replication* to the preceding pleas, taking issue. 420.
56. *Plea*, that the writ should have been in the *Per* and *Cui*, and not in the *Per*. 420.
57. *Plea* to a writ in the *Per*, that the tenant did not enter by the person named in the writ. 420.
58. *Replication* to the preceding plea, taking Issue. 421.

PLEAS PUIS DARREIN CONTINUANCE.

59. *Plea* that the demandant has entered and disseised the tenant. 421.
60. *Replication* to the preceding plea taking Issue. 421.
61. *Plea*, *Marriage* of a Feme sole Demandant. 422.
62. *Plea*, Death of one of the Demandants. 422.

PLEAS IN BAR TO WRITS OF ENTRY.

63. *Non disseisivit* to a writ of Entry in the *Quibus*, on the seisin of the Demandant. 423.
64. *Same*, to a writ upon the seisin of an Ancestor. 423.
65. *Same*, to a writ in the *Per*, the *Per* and *Cui*, or the *Post*. 423.
66. *Non-tenure*, in bar. 424.
67. *Replication* to the above plea, taking Issue. 424.
68. *Non disseisivit* to part, and *Disclaimer* to the residue. 424.
69. *Replication* to the plea of *Disclaimer*, taking Issue. 425.
70. *Plea conveyance* by the Demandant to a Stranger. 425.
71. *Replication* to the preceding plea, that *nothing passed* by the Deed. 426.
- 71, a. *Plea*, that the Demandant, who sues as Minister, has *resigned his office*, pending the writ. 426.
72. *Prayer* that the Jury may inquire as to the increased value, by reason of Buildings and Improvements. 427.

73. *Prayer* that the Jury may inquire as to the value, without the Buildings and Improvements. 427.
74. *Verdict* for the Demandant, with a finding of the value of Improvements, &c. 428.

PROCEEDINGS IN DOWER.

75. *Writ of Dower*. 428.
76. *Plea*, in Abatement, *No demand* one month before the writ was sued forth. 429.
77. *Plea* in Abatement, *No demand* upon the person who took the immediate Freehold. 429.
78. *Plea* in Bar, *Ne unques accouple*, &c. 430.
79. *Replication* to the preceding plea, taking Issue. 430.
80. *Plea* in Bar, *Ne unques seisie que Dower*. 431.
81. *Plea* in Bar, that the Husband is living. 431.
82. *Replication*, affirming the Husband's death. 431.
83. *Plea* in Bar, Dower already assigned. 432.
84. *Replication*, denying the assignment. 432.
85. *Plea* in Bar, Acquittance of Dower by the Demandant. 433.
86. *Confession* of the Demandant's right, and suggestion of improvements, since the *Alienation* by the husband. 433.
87. *Writ of seisin* of Dower. 434.

PROCEEDINGS IN FORMEDON.

88. *Formedon in the descender* by two co-heirs. 435.
89. *Plea*, General issue, *Non dedit*, or *ne dona pas*. 436.
90. *Formedon in the descender*, by the heir of the remainder-man in Tail, upon a Gift to Husband and wife. 436.
91. *Plea* in Bar, *Feoffment* of demandant's Ancestor with warranty. 437.
- 91, a. *Replication*, *Nothing by descent* from the Ancestor. 438.
92. *Formedon in the reverter* by the heir of the Donor. 439.
93. *Formedon in the remainder*, with a profert of the deed. 440.
94. Same by devisee of the remainder. 441.
95. *Plea* in Bar, *Non devisavit*. 442.
96. *Formedon in the remainder* by heirs of Remainder-man. 442.

PROCEEDINGS IN WRITS OF RIGHT.

97. *Writ of Right* on the seisin of the Demandant. 443.
98. Same by Husband and Wife, on the seisin of her Ancestor.
444.
99. *Plea in Bar, Denial* of the Ancestor's seisin. 445.
100. *Joinder of the mise* upon the *mere right*. 445.

101. *Action* for the *Mesne profits*. 446.

Note, A. 447.

TABLE OF CASES CITED.

	PAGE.
Adams vs. Barnes, 17 Mass. R. 365.	235, 236.
Ainslie vs. Martin, 9 Mass. R. 460.	179.
Alden vs. Murdock, 13 Mass. R. 259.	205.
Allen vs. Sayward, 5 Greenl. 227.	115.
Amcotts vs. Catherick, Cro. Jac. 615.	252, 253.
Ards vs. Simson, Cro. Eliz. 72.	46.
Aslin vs. Parkin, 2 Burr. 668.	358.
Astmal vs. Astmal, 2 Lev. 117.	107.
Atkyns vs. Horde, 1 Burr. 109.	32, 60, 68, 73, 79.
Austin vs. Gage, 9 Mass. R. 395.	122.
Ayer vs. Spring, 10 Mass. R. 83.	273, 284, 286.

B.

Baker vs. Baker, 4 Greenl. 67.	273, 279.
Bailey vs. March, 2 N. H. R. 526.	198.
Baily vs. Fairplay, 6 Bin. 450.	357.
Banks vs. Sutton, 2 P. Wms. 702.	248.
Barber vs. Root, 10 Mass. R. 260.	158, 169.
Barker vs. Parker, 17 Mass. R. 564.	263.
Barker & al. vs. Parker & al. 4 Pick. 505.	230.
Barr vs. Gratz, 4 Wheat. 213.	342.
Barwick's case, 5 Co. 94.	18.
Basset's case, Dyer, 133.	100.
Bates vs. Sparrell, 10 Mass. R. 325.	116, 133.
Bath, Earl of, vs. Sherwin, 1 Bro. P. C. 270.	82.
Baylies & al. vs. Bussey, 5 Greenl. 153.	204.
Bean vs. Mayo & al. 5 Greenl. 89.	238.
Bean vs. Parker & al. 17 Mass. R. 601.	35.

Beck vs. Phillips, 5 Burr. 2830.	30.
Benson vs. Matsdorf, 2 Johns. R. 369.	359.
Bethune vs. Turner, 1 Greenl. 111.	213.
Beverly's case, 4 Co. 123.	159.
Bindover vs. Sindercome, 2 Ld. Raym. 1470.	134.
Bird vs. Gardner, 10 Mass. R. 366.	255.
Blaney vs. Bearce, 2 Greenl. 132.	237.
Blight's lessee vs. Rochester, 7 Wheat. 535.	180.
Blunden vs. Baugh, Cro. Car. 302,	11, 17.
Bott vs. Burnet, 9 Mass. R. 96.	169.
Bowles' case, 11 Co. 80.	155.
Boyd's lessee vs. Cowan, 4 Dall. 142.	357.
Boylston vs. Carver, 4 Mass. R. 598.	244, 245.
Bracket vs. Norcross, 1 Greenl. 89.	45, 203.
Braman vs. Stiles, 2 Pick. 460.	168.
Brimmer vs. Prop. Long Wharf, 5 Pick. 131.	44.
Brinley vs. Whiting, 5 Pick. 348.	199.
Brockway vs. Kenney, 2 Johns. R. 220.	217.
Bromley vs. Littleton, Yelv. 112.	289.
Brown & ux. & al. vs. Inh. of Marlborough, S. J. Court, Mass. 1825.	189.
Brown vs. Nye, 12 Mass. R. 285.	166.
Brown vs. Porter, 10 Mass. R. 93.	44, 142, 166.
Brown & al. vs. Wood & ux. 17 Mass. R. 68.	210.
Browning vs. Beston, Plowd. 142.	363.
Brunswick, Inh. of First Parish in, vs. Dunning & als. 7 Mass. R. 445.	142, 145.
Bryan vs. Hinman, 5 Day, 211.	50.
Buckler's case, 2 Co. 55.	10.
Buckmere's case, 8 Co. 88.	302, 305.
Bullard vs. Briggs, 7 Pick. 533.	264.
Bullard vs. Hinckley, 5 Greenl. 272.	235.
Bunker vs. Cook, 11 Mod. 128.	36.
Burne vs. Richardson, 4 Taunt. 720.	359.
Bush vs. Bradley, 4 Day, 294.	258.

C.

Calvert vs. Horsfall, 4 Esp. R. 167.	360.
Calvin's case, 7 Co. 25, a.	259.
Campbell vs. Stiles, 9 Mass. R. 217.	99, 192.
Capel's case, 1 Co. 63.	309.
Carey vs. Prentiss, 7 Mass. R. 63.	236, 239.
Case vs. De Goes, 3 Caines' R. 261.	369.
Case vs. Shepherd, 2 Johns. Cas. 27.	363.
Catlin vs. Ware, 9 Mass. R. 220.	261, 262, 276, 284.
Chalker vs. Chalker, 1 Conn. R. 91.	24.
Chapman vs. Sharp, 2 Show. 184.	72.
Chudleigh's case, 1 Co. 140.	65.
Clanrickard vs. Lesle, Hob. 46.	92.
Clanrickard vs. Sidney Hob. 273.	219.
Clark vs. Munroe, 14 Mass. R. 351.	253.
Clark vs. Vaughan, 3 Conn. R. 191.	50.
Clay vs. White, 1 Munf. 142.	20, 38.
Clerk vs. Rowell & al. 1 Mod. 10.	82.
Cleverly vs. Whitney, 7 Pick. 36.	200.
Codman vs. Winslow, 10 Mass. R. 146.	43, 342.
Coe vs. Talcot, 5 Day, 88.	34.
Cogswell & ux. vs. Tibbets, 3 N. H. R. 41.	280.
Collins vs. Torrey, 7 Johns. R. 277.	255.
Colman vs. Anderson, 10 Mass. R. 105.	209.
Colman vs. Packard, 16 Mass. R. 39.	238.
Commonwealth vs. Andre's heirs, & al. 3 Pick. 224.	179.
vs. Dudley, 10 Mass. R. 403.	23.
vs. Harkness & al. 4 Bin. 194.	23.
vs. Peters, 2 Mass. R. 127.	165.
vs. Welcome, 5 Dane's Abr. 13.	10.
Conant vs. Little, 1 Pick. 191.	279.
Conard vs. Atlantic Ins. Co. 1 Peters, 386.	206.
Conner vs. Shepherd, 15 Mass. R. 164.	259.
Cook vs. Danvers, 7 East. 321.	216.
Cooke vs. Gibbs, 3 Mass. R. 193.	89.
Coryton vs. Lithebye, 2 Saund. 115.	172.
Cox vs. Callender, 9 Mass. R. 533.	363, 367, 370.
Crane vs. March, 4 Pick. 131.	231.

Cromwel's case, 2 Co. 77, a.	253.
Crossen vs. Dryer, 17 Mass. R. 222.	90.
Cummings vs. Wyman, 10 Mass. R. 464.	45.
Cutler vs. Haven, 8 Pick. 490.	231.
Cutter vs. Davenport, 1 Pick. 81.	233.
Cutts vs. Haskins, 11 Mass. R. 56.	171, 189.
Cutts vs. King, 5 Greenl. 482.	205.
Cutts vs. Spring, 15 Mass. R. 137.	374.

D.

Dally vs. King, 1 H. Blk. 1.	58, 320, 338, 339.
Daniels vs. Daniels, 7 Mass. R. 136.	170.
Darling vs. Chapman, 14 Mass. R. 104.	236.
Davis vs. Lees, Willes, 344.	318.
Davis & ux. vs. Martin, 3 Munf. 285.	38.
Davis vs. Mason, 4 Pick. 156.	165, 212.
Davis vs. Maynard, 9 Mass. R. 242.	236, 239.
Davol vs. Howland, 14 Mass. R. 219.	258.
Decouche vs. Savetier, 3 Johns. Ch. R. 190.	50.
Den vs. Cornell, 3 Johns. Cas. 174.	35.
Denn vs. White & ux. 7 T. R. 108.	360.
Dewey vs. Brown, 2 Pick. 387.	219.
Dewey vs. Brown, 5 Pick. 238.	181, 193.
Dewey & al. vs. Van Deusen, 4 Pick. 19.	232.
Doe vs. Davis, 1 Esp. R. 358.	360.
Doe vs. Porter, 3 T. R. 14.	35.
Dolf vs. Basset, 15 Johns. R. 23.	285, 287.
Dorchester vs. Coventry, 11 Johns. R. 510.	285.
Dowland vs. Slade, 2 B. & P. 570.	58.
Dowland vs. Slade, 5 East, 272.	326, 336.
Downall vs. Catesby, Gouldsb. 126.	294.
Draper vs. Jackson & ux. 16 Mass. R. 480.	225.
Drinkwater vs. Drinkwater, 4 Mass. R. 354.	168, 169, 232.
Dudley vs. Sumner, 5 Mass. R. 464.	308.
Duffield vs. Stille, 2 Dall. 156.	361.
Dumpor's case, 4 Co. 120, a.	28.
Dumsday vs. Hughes, 3 B. & P. 453.	58, 336.
Dunbar vs. Mitchell, 12 Mass. R. 373.	208.
Durant vs. Ritchie, 4 Mason, 45.	12.

E.

Earl of Shrewsbury's case, 1 Bulst. 9.	188.
Eldredge vs. Forrestal, 7 Mass. R. 253.	258.
Eldridge vs Acocks & al. 2 Pick. 319.	208.
Embree vs. Ellis, 2 Johns. R. 119.	282.
Emerson vs. Thompson, 2 Pick. 473.	65, 312, 367, 369, 372.
Emery vs. Chase, 5 Greenl. 232.	12, 14.
Erskine vs. Townsend, 2 Mass. R. 496.	40, 164, 227.

F.

Fairfax's devisee vs. Hunter's lessee, 7 Cranch, 603.	179.
Farrar & al. vs. Merrill, 1 Greenl. 17.	212.
Favour vs. Sargent, 6 Pick. 5.	197.
Fay vs. Valentine, 5 Pick, 418.	39.
Ferrer's case, 6 Co. 7.	80, 81, 310.
Fish vs. Fish, 1 Conn. R. 559.	225.
Fitchet vs. Adams, 2 Stra. 1128.	26, 75.
Fitzwilliams vs. Copley, Dyer, 291.	184.
Fletcher vs. M ^r Farlane, 12 Mass. R. 46.	312, 369, 371.
Fosdick vs. Gooding & al. 1 Greenl. 30.	180, 185, 271, 276.
Fowler vs. Shearer, 7 Mass. R. 20.	261, 262.
Fox vs. Fletcher, 8 Mass. R. 274.	183.
Freeman vs. Paul, 3 Greenl. 260.	41.

G.

Gage vs. Gannet & al. 10 Mass. R. 176.	85.
Gage vs. Graffam, 11 Mass. R. 181.	90.
Gainsford vs. Griffith, 1 Saund. 60.	117.
Galton vs. Harvey, 1 B. & P. 192.	334.
Gay vs. Baker, 17 Mass. R. 435.	133.
Gibson vs. Crehore, 3 Pick. 475.	41, 256, 283.
Gibson vs. Crehore, 5 Pick. 146.	41, 255, 256.
Gibson vs. Gibson, 15 Mass. R. 106.	12, 265.
Gibson vs. Smith, 2 Atk. 183.	175.
Goodall's case, 5 Co. 95.	223.
Goodright, ex dem. Hare vs. Cator, Doug. 477.	49, 74, 78.
Goodright vs. Forrester, 8 East, 552. 1 Taunt. 578.	32, 36.
Goodtitle vs. Tombs, 3 Wils. 118.	358, 373.

D

Goodtitle vs. Walton, 2 Stra. 834.	134.
Gookin vs. Whittier, 4 Greenl. 16.	38.
Gore's lessee vs. Worthington, 3 Maryl. R. 96.	357.
Gore vs. Brazer, 3 Mass. R. 523.	169, 284, 286.
Gould vs. Newman, 6 Mass. R. 240.	198, 230, 231.
Gravesend vs. Voorhis, 1 Johns. Cas. 237.	103.
Gray vs. Blanchard, 8 Pick. 284.	25, 74.
Gray vs. Gardner, 3 Mass. R. 399.	210.
Green vs. Biddle, 8 Wheat. 75.	351.
Green vs. Kemp, 13 Mass. R. 515.	228, 236.
Green vs. Liter, 8 Cranch, 229.	19, 20, 42, 43, 45, 85, 137.
	167, 175, 176, 181, 205, 206, 327, 330, 340, 341, 343.
Green vs. Watkins, 7 Wheat. 27.	332, 339.

H.

Hadley & ux. vs. Houghton, 7 Pick. 29.	39.
Haines vs. Budd, 1 Johns. Cas. 335.	103.
Hale vs. Inh. of Portland, 4 Greenl. 77.	213.
Hall vs. Vandegrift, 3 Bin. 374.	50.
Harbert vs. Bynion, 3 Bulst. 142.	101.
Hart vs. Johnson, 7 Mass. R. 472.	203.
Hastings vs. Dickinson, 7 Mass. R. 153.	264, 265.
Hathorne vs. Haines, 1 Greenl. 238.	85, 199.
Hawkes vs. Inh. Kennebec Co., 7 Mass. R. 461.	85.
Haworth vs. Herbert, Dyer, 106, b.	280.
Heath vs. Wells & al. 5 Pick. 140.	204.
Heidon vs. Igrave, 3 Leon. 162.	335, 336.
Herbert's case, 3 Co. 13.	100.
Herring vs. Polley, 8 Mass. R. 119.	220.
Higbee vs. Rice, 5 Mass. R. 352.	10, 12, 44, 45, 175, 177, 181, 205.
Hildreth vs. Jones, 13 Mass. R. 525.	263.
Hill vs. Dyer, 3 Greenl. 441.	19.
Hill vs. Thompson, 16 Mass. R. 191.	263.
Hill vs. Payson, 3 Mass. R. 559.	164.
Hillhouse vs. Chester, 3 Day, 210.	38.
Hills vs. Eliot, 12 Mass. R. 30.	229.
Hitchcock vs. Harrington, 6 Johns. R. 290.	255, 282.

TABLE OF CASES CITED.

XXV

Hogan vs. Jackson, Cowp. 305.	36.
Holbrook vs. Finney, 4 Mass. R. 568.	252.
Holcomb vs. Rawlins, Cro. Eliz. 540. Moore, 461.	
Owen, 111.	369.
Holdfast vs. Morris, 2 Wills. 115.	361.
Holmes vs. Holmes & al. 2 Pick. 23.	136, 172.
Holyoke vs. Haskins, 5 Pick. 20.	211.
Hopkins vs. Hopkins, 1 Atk. 591.	17.
Howard vs. Chadbourne, 5 Greenl. 15.	198.
Hubbard & al. vs. Cummings, 1 Greenl. 11.	161.
Hubbel vs. Cowdry, 5 Johns. R. 132.	50.
Humphrey vs. Phinney, 2 Johns. R. 484.	285.
Hunlock vs. Petre, 2, Lutw. 963.	304.
Hunt vs. Burn or Bourne, 2 Salk. 422.	216.
Hunt vs. Sprague, 3 Mass. R. 312.	180, 181.
Hurd vs. Cushing, 7 Pick. 169.	169.
Hutchinson vs. Brock, 11 Mass. R. 119.	178.
Hyatt vs. Wood, 4 Johns. R. 150.	24.

I.

Ilderton vs. Ilderton, 2 H. Blk. 145.	277.
Inglis vs. Trustees of Sailor's Snug Harbour, 3 Peters, 99.	
	177, 200, 219, 277, 332, 336, 339.

J.

Jackson vs. Burchin, 14 Johns. R. 124.	161.
Jackson vs. Carpenter, 11 Johns. R. 541.	161.
Jackson vs. Crysler, 1 Johns. Cas. 125.	73, 78.
Jackson vs. Hasbrouck, 3 Johns. R. 331.	34.
Jackson vs. How, 14 Johns. R. 406.	20, 37.
Jackson vs. Matsdorf, 11 Johns. R. 97.	11.
Jackson vs. Murray, 12 Johns. R. 201	34.
Jackson vs. Potter, 9 Johns. R. 312.	36.
Jackson vs. Schoonmaker, 4 Johns. R. 390.	51, 69.
Jackson vs. Sellick, 8 Johns. R. 269.	38.
Jackson vs. Stone, 13, Johns. R. 447.	359.
Jackson vs. Vredenberg, 1 Johns. R. 159, 163.	34.
Jayne vs. Price, 5 Taunt, 326. 1 Marsh. 68.	58, 342.
Joan & al. vs. Shield's lessee, 3 Maryl. R. 7.	357.
Johnson vs. Morse, 3 N. H. R. 48.	279.

Johnson vs. Perley, 2 N. H. R. 56.	259.
Jones & ux. vs. Brewer, 1 Pick. 314.	279.
Jones vs. Carter, 12 Mass. R. 314.	371.
Jones & al. vs. Roe, 3 T. R. 88.	36.

K.

Keith vs. Swan, 11 Mass. R. 216.	180, 191, 193, 234.
Kelleran vs. Brown, 4 Mass. R. 444.	243.
Kennebeck Purchase vs. Davis, 1 Greenl. 309.	205.
Kennebeck Purchase vs. Davis, 2 Greenl. 352.	203.
Kennebeck Purchase vs. Kavenagh, 1 Greenl. 348.	204.
Kennebeck Purchase vs. Laboree & al. 2 Greenl. 275.	10.
Kennebeck Purchase vs. Springer, 4 Mass. R. 416.	42, 43, 44.
Knight vs. Thornborough, Hob. 82.	27.
Knox & al. vs. Hook, 12 Mass. R. 329.	204.
Knox vs. Jenks, 7 Mass. R. 488.	168, 211.
Knox vs. Kellock, 14 Mass. R. 200.	34, 200.
Knox & al. vs. Lermond, 3 Greenl. 377.	202.

L.

Langdon vs. Potter, 3 Mass. R. 215.	43, 169, 342.
Langdon vs. Potter 11 Mass. R. 313.	233.
Langdon & al. vs. Rowleston, 2 Taunt. 441.	50.
Leonard vs. Leonard, 4 Mass. R. 533.	270.
Levine vs. Taylor, 12 Mass. R. 8.	178.
Liford's case, 11 Co. 51.	362, 368.
Lincoln & Kennebeck Bank vs. Drummond, 5 Mass. R. 321.	74.
Liter vs. Green, 2 Wheat. 306.	319, 329, 331.
Lithgow vs. Cavenagh, 9 Mass. R. 172.	261.
Little vs. Libby, 2 Greenl. 242.	43.
Livermore vs. Bagley, 3 Mass. R. 487.	18.
Longville vs. Thistleworth, 6 Mod. 28.	98.
Lord Cromwel's case, 2 Co. 77, a.	253.
Loring vs. Cooke, 3 Pick. 48.	236.
Lowe & al. vs. Paramour, Dyer, 301.	334.
Lufkin vs. Curtis, 13 Mass. R. 223.	261, 262.
Luke vs. Harris, 2 Blk. R. 1261, 1293.	58, 335, 336, 339.

TABLE OF CASES CITED.

xxix

M.

Maidment vs. Jukes, 2 N. R. 429.	58.
Maigley vs. Hauer, 7 Johns. R. 341.	14.
Markal's case, 6 Co. 3, b.	100, 101, 102.
Marshall vs. Fisk, 6 Mass. R. 24.	12, 13, 261.
Marsteller vs. M'Clean, 7 Cranch, 156.	50.
Marston vs. Hobbs, 2 Mass. R. 438.	109.
Martin vs. Commonwealth, 1 Mass. R. 347.	99.
Martin vs. Woods, 9 Mass. R. 377.	73.
Mason vs. Muncaster, 9 Wheat. 454.	11.
Mather vs. Hood, 8 Johns. R. 44.	23.
Maynard vs. Hunt, 5 Pick. 240.	236.
M'Crakin vs. Wright, 14 Johns. R. 193.	34.
Medbury vs. Hopkins, 3 Conn. R. 372.	50.
Mildmay's case, 6 Co. 40, b.	28, 32.
Miller & al. vs. Miller, 4 Pick. 244.	165.
Mills vs. Pierce, 2 N. H. R. 10.	180, 206.
Minor & al. vs. Mechanic's Bank of Alexandria, 1 Peters, 74.	177.
Moore vs. Hussey, Hob. 98.	364.
Mordant vs. Thorald, 1 Salk. 252. 3 Mod. 281.	289.
Murray vs. Baker, 3 Wheat. 541.	51.
Murray vs. Gouverneur, 2 Johns. Cas. 441.	374.

N.

Nash vs. Tupper, 1 Caines' R. 402.	50.
Newall & al. vs. Wright, 3 Mass. R. 138.	40, 235.
Newhall vs. Hopkins, 6 Mass. R. 350.	207, 339.
Newhall vs. Saddler, 17 Mass. R. 350	204.
Newman vs. Newman, 3 Wils. 516.	73.
Nokes' Case, 4 Co. 80.	117.
Norton vs. Soule, 2 Greenl. 341.	237.

O.

Olney vs. Adams, 7 Pick. 31.	231.
Onslow vs. Smith, 2 B. & P. 384.	96, 97, 331.
Otis vs. Warren, 14 Mass. R. 239.	180, 191, 193, 194, 276, 307.

Outram vs. Morewood, 3 East, 346.	364.
Oxnard vs. Prop. Kennebeck Purchase, 10 Mass. R. 179.	94,
	172, 188.

P.

Palmer vs. Horton, 1 Johns. Cas. 27.	260.
Parker vs. Murphy, 12 Mass. R. 485.	272.
Parlin vs. Haynes, 5 Greenl. 178.	198.
Parlin vs. Macomber, 5 Greenl. 413.	194.
Parsons vs. Wells & al. 17 Mass. R. 419.	164.
Partridge & ux. vs. Gordon, 15 Mass. R. 487.	228, 242.
Pearsall vs. Dwight, 2 Mass. R. 84.	50.
Pearson vs. Maynard, 1 Taunt, 415.	336.
Penniman vs. Hollis, 13 Mass. R. 429.	41, 228.
Perkins vs. Fairfield, 11 Mass. R. 227.	211.
Perkins vs. Little, 1 Greenl. 148.	265.
Perkins vs. Pitts, 11 Mass. R. 134.	164.
Perley vs. Chandler, 6 Mass. R. 454.	165.
Perry vs. Goodwin, 6 Mass. R. 499.	281.
Peters and al. vs. Foss, 5 Greenl. 182.	10.
Pilford's case, 10 Co. 116.	344.
Pitcher vs. Livingston, 4 Johns, R. 1.	285.
Pitts vs. Temple, 2 Mass. R. 538.	210.
Pitts vs. Tilden, 2 Mass. R. 118.	239.
Plasket vs. Beeby & al. 4 East. 485.	102.
Pinkham vs. Gear, 3 N. H. R. 163.	279.
Poignard vs. Smith, 6 Pick. 172.	44, 203, 218, 235.
Poignard vs. Smith, 8 Pick. 272.	33, 43, 230, 241.
Polyblank vs. Hawkins, Doug. 329.	136, 140.
Pomeroy vs. Winship, 12 Mass. R. 514.	41, 228, 242.
Pond vs. Wetherbee, 4 Pick. 312.	168.
Poor vs. Robinson, 10 Mass. R. 131.	36, 93, 94, 172, 206,
	339, 342.
Popkin vs. Bumstead, 8 Mass. R. 491.	263.
Porter vs. Cole, 4 Greenl. 20.	186
Porter vs. Hammond, 3 Greenl. 188,	33.
Porter vs. Perkins, 5 Mass. R. 233.	165.
Porter vs. Rummery, 10 Mass. R. 64.	182, 197, 217.

TABLE OF CASES CITED.

xxxi

Powell vs. Monson & Brimfield Man. Co. 3 Mason, 347,	262, 284.
Pray vs. Pierce, 7 Mass. R. 381.	13, 44, 205.
Prescott vs. Hutchinson, 13 Mass. R. 439.	186, 191, 193, 196, 197, 205, 307.
Prescott vs. Nevers, 4 Mason, 326.	45.
Prescott vs. Tufts, 7 Mass. R. 209.	90.
Proprietors of Kennebeck Purchase, vs. Davis, 1 Greenl. 309.	205.
Proprietors of Kennebeck Purchase, vs. Davis, 2 Greenl. 352	203.
Proprietors of Kennebeck Purchase, vs. Kavenagh, 1 Greenl. 348.	204.
Proprietors of Kennebeck Purchase vs. Laboree & al. 2 Greenl. 275.	10.
Proprietors of Kennebeck Purchase vs. Springer, 4 Mass. R. 416.	42, 43, 44.
Proprietors of Monumoi Great Beach vs. Rogers, 1 Mass. R. 159.	210.
Proprietors of No. 6 vs. McFarland, 12 Mass. R. 325.	5, 75, 76.
Proprietors of Shapleigh vs. Pillsbury, 1 Greenl. 271.	198.

R.

Rathbone vs. Rathbone, 4 Pick. 89.	192.
Rawlings vs. Rawlings, 3 Maryl. R. 413.	23.
Read & Redman's case, 10 Co. 134.	94.
Reading vs. Royston, 2 Salk. 423. 2 Ld. Raym. 829.	177.
Reed vs. Davis & al. 4 Pick. 216.	39, 42.
Rehoboth, Inh. of, vs. Hunt, 1 Pick. 224.	172.
Ricard vs. Williams, 7 Wheat. 107. 5, 6, 16, 43, 45, 214.	
Rigley vs. Lee & ux. Cro. Car. 356.	173.
Robins vs. Crutchley, 2 Wills. 128.	273, 277.
Robinson vs. Campbell, 3 Wheat. 212.	59.
Robinson vs. Swett, 3 Greenl. 316.	20, 44, 47, 51.
Roe, ex dem. Noden, vs. Griffiths, 4 Burr. 1961.	36.
Roe vs. Tranmer, 2 Wils. 75.	14.
Ropps vs. Barker & al. 4 Pick. 209.	218.

Ross. vs. Gould, 5 Greenl. 204.	43.
Rowe vs. Hamilton, 5 Greenl. 63.	262, 265.
Royce. vs. Burrell & al. 12 Mass. R. 395.	122.
Rush vs. Bradley, 4 Day, 306.	38.
Russell vs. Blake, 2 Pick. 505.	374.
Russell vs. Coffin, 8 Pick. 143.	13.
Russell vs. Lewis, 2 Pick. 508.	205.
Ryder vs. Robinson, 2 Greenl. 127.	173.

S.

Sage vs. Phelps, 2 Day, 151.	34.
Sanford vs. Button, 4 Day, 310.	50.
Saunders vs. Annesley, 2 Sch. & Lef. 104.	68, 166.
Saunders & al. vs. Frost, 5 Pick. 259.	40, 240.
Schofield & al. vs. Lodie, 1 Johns. Cas. 395.	104.
Scott vs. McFarland, 13 Mass. R. 311.	237.
Sewall vs. Lee, 9 Mass. R. 363.	260.
Shapleigh, Prop. of, vs. Pillsbury, 1 Greenl. 271.	198.
Shaw vs. Hearsay, 5 Mass. R. 521.	183.
Sheafe vs. O'Neil, 9 Mass. R. 12.	269, 270, 271.
Shelley's case 1 Co. 98 b.	37.
Shepherd vs. Howard, 2 N. H. R. 507.	262.
Shotwell, <i>ex parte</i> , 10 Johns. R. 304.	23.
Shrewsbury's case, 1 Bulst. 9.	188.
Shumway vs. Holbrook, 1 Pick. 114.	44
Skinner & al. vs. Brewer, 4 Pick. 468.	39.
Slade & ux. vs. Dowland, 2 B. & P. 570.	326, 328, 336.
Smith's case, 1 Chan. Cas. 112.	159.
Smith vs. Burtis, 6 Johns. R. 217.	69.
Smith & al. vs. Dyer, 16 Mass. R. 18.	41.
Smithwick vs Jordan, 15 Mass. R. 113.	36.
Snow vs. Stevens, 15 Mass. R. 278.	255.
Society for propagating the Gospel vs. Pawlet, 4 Peter's, 501.	206.
Somes vs. Skinner, 16 Mass. R. 348.	41, 159, 177, 233.
Somes vs. Skinner, 3 Pick. 52.	11, 219, 234.
Stanley vs. Perley, 5 Greenl. 369.	198.
Starr vs Jackson, 11 Mass. R. 519.	362.

TABLE OF CASES CITED.

xxiii

State vs. Gilbert, 2 Bay, 355.	23.
Stearns vs. Stearns, 16 Mass. R. 171.	270.
Stearns vs. Swift, 8 Pick. 532.	262, 287.
Stevens vs. Stevens, 13 Johns. R. 316.	34.
Stevens & ux. vs. Winship & ux. 1 Pick. 318.	71, 205, 216.
Stinson vs. Sumner, 9 Mass. R. 143.	263.
Stockbridge vs. West Stockbridge, 14 Mass. R. 261.	210.
Stokes vs. Dawes, 4 Mass. R. 268.	19.
Stow vs. Tift, 15 Johns. R. 458.	252.
Stowell vs. Pike & al. 2 Greenl. 387.	229.
Stuyvesant vs. Tompkins & al. 9 Johns. R. 61.	24, 362.
Sutton, First Parish in, vs. Cole, 3 Pick. 232.	46, 75.
Symons vs. Clark, Barnes, 452.	108.
Symons vs. Symons, Heil. 66.	368.

T.

Taylor, ex dem. Atkins, vs. Horde, 1 Burr. 60.	32, 60, 68, 73, 79.
Taylor vs. Porter, 7 Mass. R. 355.	234, 241.
Ten Eyck vs. Waterberry, 7 Cowen, 52.	200, 332, 339.
Terrett vs. Taylor, 9 Cranch, 43.	11.
Thacher vs. Omans & al. 3 Pick. 521.	12.
Thayer vs. Smith, 17 Mass. R. 429.	39.
Thomas vs. Smith, 2 Mass. R. 480.	173.
Thompson & al. vs. Androscoggin Bridge, 5 Greenl. 62.	345.
Thompson vs. Hatch, 3 Pick. 512.	192.
Thorndike vs. Barrett, 2 Greenl. 312.	168.
Tinkham vs. Arnold, 3 Greenl. 120.	69, 214.
Tolman vs. Emerson, 4 Pick. 160.	48.
Treat & al. vs. McMahon, 2 Greenl. 120.	122.
Tyssen vs. Clarke, 3 Wils. 419, 541.	58, 200, 332.
Tyssen vs. Clarke, 3 Wils. 558.	317, 318, 332, 333, 335, 343, 344.

U.

Union bank vs. Thayer, 14 Mass. R. 362.	241.
---	------

E

V.

Van Benthuyssen vs. De Witt, 4 Johns. R. 213.	218.
Varnum vs. Abbot, 12 Mass. R. 474.	176.
Vernon's case, 4 Co. 2.	264.
Vose vs. Hardy, 2 Greenl. 322.	243.

W.

Wade's case, 5 Co. 114,	223.
Wait vs. Maxwell, 5 Pick. 217.	11.
Walcutt vs. Spencer, 14 Mass. R. 410.	207.
Walker vs. Dewing & al. 8 Pick. 520.	219, 287.
Walker, vs. Griswold, 6 Pick. 416.	255.
Wallingford vs. Hearl, 15 Mass. R. 471.	50, 216.
Wallis vs. Wallis, 4 Mass. R. 135.	13.
Ward vs. Bartholomew, 6 Pick. 409.	19, 156, 218.
Warren vs. Childs, 11 Mass. R. 225.	10.
Watkins vs. Hill, 8 Pick. 522.	239.
Webb vs. Townsend, 1 Pick. 21.	259.
Webster vs. Woodford, 3 Day, 90.	159.
Wells vs. Martin, 2 Bay, 20.	260.
Wells vs. Prince, 4 Mass. R. 67.	73, 167, 218.
Wells vs. Prince, 9 Mass. R. 508.	216.
West vs. Chamberlin, 8 Pick. 336.	237.
Weston vs. Hunt, 2 Mass. R. 500.	141, 145, 146.
White & ux. vs. Willis, 7 Pick. 143.	259.
Whittingham's case, 8 Co. 42.	160, 162.
Wickham vs. Freeman, 12 Johns. R. 183.	362.
Wilder vs. Houghton, 1 Pick. 87.	371.
Wilder vs. Whittemore, 15 Mass. R. 262.	240.
Willard vs. Nason, 5 Mass. R. 241.	168, 245.
Williams vs. Gray, 3 Greenl. 207.	45.
Williams vs. Jackson, 5 Johns. R. 489.	34, 198.
Winthrop vs. Curtis, 4 Greenl. 297.	202.
Withington vs. Corey, 2 N. H. R. 115.	371.
Wolcot vs. Knight, 6 Mass. R. 418.	34, 198, 200, 207.

Z.

Zouch vs. Parsons, 3 Burr. 1794	160.
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INTRODUCTION.



SECT. I. THE necessity of some ceremony to be observed in the transfer of the property of one proprietor of the soil to another, which should constitute the evidence of such transfer, seems to have been early understood, if it was not indeed coeval with the first notions of *individual* property among all nations. By the ancient common law of England, the ceremony established for this purpose, consisted of a *feoffment* and *entry*, which conveyed to the feoffee a perfect and indefeasible estate, when *rightfully* made; and, even when wrongful, transferred the fee, though it left the title to it imperfect, and liable to be defeated by the rightful owner. The party who thus acquired the estate was said to be *seised* of it. But when he obtained it by such *wrongful* act, he was denominated a *disseisor*, and was said to acquire the estate by *desseisin*.

The importance of a correct understanding of these terms by the student, must be manifest. An [2] explanation, therefore, of their operation and consequences, whether rightfully or wrongfully made, may perhaps be considered a proper, and even a necessary introduction, to the summary view which it is proposed to give of the *Law and Practice of Real Actions* in the ensuing pages.

SECT. II. *Seisin*, in the original and technical sense of the term, denotes the completion of that *Feudal in-*

vestiture, by which the tenant was admitted into the tenure, and without which *no freehold* could be constituted or conveyed. It was distinguished into seisin *in fact*, and seisin *in law*. *Seisin in fact* is when a person has the *actual* seisin or possession. *Seisin in law* is when, upon the death of the ancestor or devisor, the heir, to whom the lands descend, or the devisee, to whom they are devised, has not entered upon them, so as to acquire the *actual* seisin or possession; and no other person having usurped the possession, it remains vacant. The seisin may be in *severalty*, in *joint tenure*, or in *common*. There is also another diversity of seisin, arising from the carving of the inheritance into different estates; as where A. has an estate for life, with the remainder or reversion to B. in fee. In this case, not only he who has the freehold in possession, but he also who has the remainder or reversion, is equally *in the seisin* of the estate.

[3] But in this case, there is a distinction also, somewhat analogous to that before mentioned, between the *expectant nature* of the seisin of him who has the remainder or reversion, and the *actual* seisin of the tenant in possession. Such, however, is the connexion and dependence of one portion of the estate upon the other, that any act, even of a stranger, that disturbs the estate of the tenant for life, is a disturbance of the whole fee. And by the common law, any *denial* or *disaffirmance* of the *title* of the reversioner, by the tenant for life, was the forfeiture of the estate of the tenant. This, however, it is to be observed, resulted from the duty by which the tenant was bound to his feudal lord, and was the consequence of the strict doctrines of the feudal tenure. With us, therefore, the tenant in possession incurs no forfeiture by denial or disaffirmance of the title of the reversioner.

SECT. III. It is said by lord *C. B. Gilbert*, (*Gilb. Law of Tenures*, 39.) that feoffments were anciently made upon the land, before the *pares*, who subscribed the charter of feoffment, (or rather had their names subscribed to it,) in the *hiis testibus*; and that the entry of the feoffee was recorded in the records of the lord's court. At a later period, the feoffment was allowed to be good, though attested by other persons than [4] the *pares curiæ*; and the entry was considered as valid, when made upon the land in the presence of the peers of the court, though not recorded. Afterwards, though it was not required that feoffments should be attested by the *pares curiæ*, it was necessary that they should have the attestation of the *pares comitatus*, by whom they were to be tried. Therefore, if the lands were in different counties, there must have been livery and entry in each county; because both, if controverted, must have been proved by the *pares comitatus*. And Mr. *Sullivan* in his lectures, assigns several reasons why the presence of the *pares curiæ*, upon the transferring of the freehold, should be equally desirable to the tenants, and to the lords of whom they held. *Lecture vi. p. 142.* This rule, indeed, as to an entry, which limits its operation to the lands lying in the county in which the entry is made, still prevails, not only in England, but in this country, though the reasons upon which it was founded have ceased to exist. It seems, however, that the custom of making livery before the peers of the court, and recording the entry, as abovementioned, was early dispensed with, and had fallen into disuse, even before the time of *Bracton*. For he does not mention the necessity of the *pares curiæ* being present, or the entry of the feoffee being recorded in the lord's court, in order to complete his seisin. *Brac. lib. 2. c. 18. p. 39.* Indeed, [5]

the description of a feoffment by Blackstone, (2 *Com.* 315.) as used in modern times, is merely a transcript from *Bracton*. And it is manifest, as Mr. *Butler* has observed, (*Co. Litt.* 330, b. n. 1.) that from the reign of Henry II. to the present time, no other ceremony was used, than what is now practised in England, of the feoffor and feoffee coming upon the land, either in person, or by attorney, (all other persons being out of the land,) and the feoffor there, in presence of witnesses, delivering the possession of it to the feoffee. Such was the ceremony by which the feoffor parted with the *seisin*, and the feoffee acquired it *rightfully*.

SECT. IV. But the *seisin*, as was before intimated, might be lost and acquired by *wrong*, that is by *disseisin*, which in the ancient law technically implies the turning of the tenant out of his fee, and usurping his place, in relation to the lord of whom he held. To constitute an *actual* disseisin, therefore, in the strict sense of the term, it was necessary that the disseisor should enter *without having a right*, the disseisee being in the *actual* possession of the land ; and that the disseisor should, with some

degree of force, expel him therefrom, and substitute [6] himself as tenant to the lord. It seems doubtful,

however, whether this substitution of one tenant for another, could be effected without the connivance, or perhaps the consent of the lord, according to the doctrines and practice of the *feudal law*. [For the lord was not obliged to accept the disseisor as his tenant ; but had his election to consider the disseisor *or* the disseisee answerable for his services. *Litt.* § 254. And until he accepted the disseisor as his tenant, he might claim the benefit of an escheat on the death of the disseisee without heirs. But he could not claim the benefit of the escheat, if he once accepted the disseisor as his tenant ;

since all privity between the lord and the disseisee was thereby determined. It necessarily followed, that the alienee of the disseisor, as he came in under the feudal contract, became tenant to the lord, as did the heir of the disseisor also, even against the lord's will. *Co. Litt.* 268, a, b.] By the more modern doctrines of the English law, since tenures were abolished, and especially by the law of our own country, a disseisin consists in usurping the dominion of the disseisee over his real property, and not his feudal relation to the lord of the fee. Yet the force ascribed to a disseisin by the ancient law, of transferring the freehold as effectually by *wrong*, as a feoffment does by *right*, still remains. For, as by the feudal laws, the freehold could not be transferred without livery of seisin, and livery of seisin could not be made by one who had the possession, *without transferring the freehold*: so also by a disseisin the disseisor cannot acquire a *less estate than a fee simple*, even though he should expressly claim a less one; (except in the single case of an entry on land, claiming a particular estate, as an estate for life or years, and *against the tenant of such particular estate* :) it being a well settled rule of law, that a disseisor shall not restrict or qualify his own wrong. *Co. Litt.* 296, b. n. 1.—12 *Mass. R.* 325, *Proprietors, &c. vs. McFarland*.—7 *Wheat.* 107. But this rule, it should be remembered, was established for the benefit of the disseisee, and that he might *elect* his remedy. It must therefore be restricted in its application to an avowed usurpation of the seisin, and not applied to [7] an entry under a mistaken belief of title to a *particular estate* in the premises. For where a man enters upon land, under a supposed lawful title to some limited estate, as under a lease which proves to be void, or the like; though such a mistake will not excuse the trespass, he

can only be a disseisor, at the *election* of the disseisee. There is no rule of law, which precludes the disseisee from considering the party so entering, as a mere trespasser, and proceeding against him as such, at his election. Indeed there is nothing which makes such entry, under a mistaken claim of some limited estate, an *absolute disseisin* of the fee, so that a descent cast would *toll* the entry of the disseisee. 7 *Wheat.* 107, *Ricard vs. Williams* ; *Com. D. Seisin*, F. 2. 3. [And if a man enter, claiming a particular estate, when in point of fact there is *no such estate*, it is a disseisin of the fee ; for a particular estate cannot be created, *or carved out of the fee*, by a claim or entry ; and mere words will not qualify the wrongful act. Even where a man enters upon *his own* tenant for life, and disseises him, he thereby acquires a *new estate* in fee, under a new title, and does not retain the seisin or estate which he had before ; consequently he cannot, after such disseisin, grant his reversion *by that name* ; because, so long as the disseisin continues, he has the fee simple in possession. 2 *Prest. on Abst.* 405.]

Generally, the act of one who takes upon himself to transfer, or to usurp the *seisin in fee*, admits of no qualification. The feoffor cannot part with the seisin, without transferring it to the feoffee ; neither can the disseisor deprive the disseisee of it, without at the same moment acquiring it himself. [But though a *stranger* cannot gain an actual seisin against the owner of the estate, without ousting him or his tenant, (unless it be of land that is unoccupied ;) yet, in furtherance of right, any person *who may lawfully enter*, may restore his seisin by an actual entry, without turning the person who has the actual seisin, out of possession. And if he who has thus regained the seisin rightfully be denied the occupa-

tion by the person in possession, it is a new disseisin, upon which he may bring his action, or date the commencement of a new right of entry.

With respect to remainders and reversions, it may be observed, that if a tenant for years be ousted, and the remainder-man or reversioner thereby disseised, the re-entry of the tenant will also restore the estate of the remainder-man or reversioner, so long as their right of entry continues : but when their right of entry is lost by lapse of time, or tolled by a descent, &c. though the re-entry of the termor may be good to restore *his own* interest, the seisin under the remainder or reversion can only be restored by an action. *Litt.* § 411.]

SECT. V. The disseisin of which we have hitherto spoken, consists in the *wrongful entry* of a person not before in possession, and the expulsion of the rightful owner by him. There may also be a disseisin [8] committed by any person who is *rightfully* in the possession, provided he is not the absolute owner of the *whole fee simple*. Thus tenants for years, at will, and by sufferance, (and in England, copy holders, tenants by *elegit*, statute merchant, and statute staple,) are all considered as having the estate *rightfully*; yet each of them, by making a feoffment, may disseise the owner of the fee, and vest in his own feoffee an *actual*, though defeasible, estate of freehold. A feoffment so executed, (or other conveyance, if the grantee enters by force of it,) is immediately valid against every person but the rightful owner. And it may become valid even against the owner himself, if he neglect to enter within twenty years, and, according to our limitation, bring no writ of entry within thirty years, or writ of right within forty years. But by making his entry, or bringing his action, within the time limited by the law, the wrongful estate is defeat-

ed, and the seisin is revested in himself. And in every case, however feeble, slender, or *even wrongful*, the possession of the feoffor may be, his feoffment *necessarily vests the freehold in the feoffee*, until the disseisee, by his entry or by action, regains the possession.

SECT. VI. The law however was not satisfied, with defeating the estate thus wrongfully created by such [9] feoffment. It also punished the perfidy of the particular tenant, (who had made such an unlawful use of the possession, which had been entrusted to him,) by the forfeiture of his estate to the remainder-man or reversioner. *Co. Litt.* 251. This forfeiture was a consequence deduced from the doctrines of the feudal law. By that law, as originally established, if the vassal aliened the whole, or any part of his feud, or if he even refused to perform the feudal services, it was regarded as a renunciation of his subjection to the lord of the fee, and consequently a just cause of forfeiture. Afterwards it was considered *too severe* a punishment for the mere *neglect or delay* of the feudal services, to permit the lord to resume the feud, as forfeited to himself. And in order to substitute a milder remedy for this severe penalty, *distresses* were introduced from the civil law, to compel the tenant to perform his duty. But the only redress, where the tenant for life made a feoffment in fee, was a seizure of the land itself. *Gilb. Tenures*, 38. In these cases, the effect of the forfeiture was to let in the remainder or reversion, to commence immediately, unless it happened that the particular tenant had, before the forfeiture, created a legal estate. For if such an estate had been created by the particular tenant before the act was done, by which he incurred a forfeiture, the law [10] would protect the right of such innocent party. Thus where lessee for twenty years made a lease

for ten years, and then made a feoffment in fee, by which he forfeited his term, the estate of the under lessee was protected. For the law would not suffer him who had created a legal estate, to defeat the interest which he had himself created. 2 *Bl. Com.* 275.—*Co. Litt.* 233, b.

In the case of a feoffment by the tenant for life or years, it did not prevent the forfeiture, though the feoffment was *upon condition*, and the feoffor had entered for condition broken. The entry for the breach of the condition would indeed reduce the estate, so that he should be tenant for life again ; but it could not purge the forfeiture, or prevent the reversioner taking advantage of it. *Co. Litt.* 202, b. 252, a. So also, where one entitled to be tenant by the curtesy, made a feoffment in fee upon condition, and entered for a breach of the condition, after which the wife died ; he could not afterwards be tenant by the curtesy. For although the estate which he conveyed by the feoffment was conditional, yet it was held that his title to be tenant by the curtesy was forfeited, and became absolutely extinct by the feoffment. *Co. Litt.* 30, b.

SECT. VII. But it is to be observed, that even in England, no conveyance of the particular tenant creates a forfeiture, except those which *divest* [11] the remainder or reversion ; which effect is produced *only* by a *feoffment*, *fine*, and *common recovery*. A conveyance by lease and release, or bargain and sale, made by the particular tenant, and purporting to convey the fee simple, is no forfeiture, nor will it defeat a contingent remainder ; because the operation of these conveyances is, only to transfer to the releasee or bargainee such estate as the releasor or bargainor may *rightfully* convey. 2 *Leon.* 60 ; 3 *Mod.* 161. And this distinction between the operation of a feoffment, fine, and recovery

on the *one hand*, and a bargain and sale, lease and release, and covenant to stand seised, on the *other*, is what is meant by the expression which sometimes occurs, where the former are described as *tortious*, and the latter as *rightful* conveyances.

Feoffments, fines, and recoveries are not in use with us, as common assurances, or conveyances of land. The two former were probably never introduced into this state; and the other was chiefly resorted to, for the purpose of barring estates tail, before the statute of 1791, ch. 61, permitted that to be done by the deed of the tenant. For this reason, and, perhaps, because we do not recognize the common law doctrines of *tenure* in their whole extent, no *common deed of conveyance*, by the tenant of the

particular estate, was probably ever held with us, to

[12] be a forfeiture, so as to let in the remainder-man or reversioner, before the regular determination of the preceding estate. [But see 5 *Dane's Abr.* 11, 12, 13.]

Yet it should be understood that we adopt the doctrines of the feudal law, as to tortious feoffments, to a certain extent. For it has been held, that a deed of conveyance, made by a person in possession of lands *without title*, and an *actual entry* under such deed by the grantee, is a disseisin of the owner. 11 *Mass. R.* 225, *Warren vs. Childs*. [See 5 *Greenl.* 182; 2 *Greenl.* 275, and *Maine Stat.* 1821. ch. 62. § 6.] But the disseisin does not, perhaps, so much result from the *conveyance*, in this case, as from the *entry*; which would have been equally a disseisin, had the deed been made by a person *not in possession*, if the grantee entered, and pretended to claim by force of it. 5 *Mass. R.* 352, *Higbee vs. Rice*.

[For the law has been well settled, at least since the decision of Buckler's case, in the 40th of Eliz., that if a person enter upon land by colour of a void grant made

to him of it, such entry is a disseisin. 3 *Co.* 55, 3d *resolution*. So if a man enter under colour of a void will, he is a disseisor;—or if heirs enter upon, and make claim to, an estate that has been devised. 2 *Prest. Abst.* 292. The same is the effect of an entry under a void lease for life; (*Cro. Car.* 302, *Blunden vs. Baugh*;) or under a feoffment by tenant at will, for years, or a stranger. *Co. Litt.* 327, b; 330, b; 367, a. Even in the case of an infant, or person *non compos mentis*, if he make a deed, which is *actually void*, the entry of the *intended grantee* will gain the fee for him by way of disseisin. 1 *Prest. Abst.* 326. The deed therefore of a person *non compos mentis*, not under guardianship, being voidable only, conveys a seisin to the grantee: but if he is under guardianship, the deed is void; and the grantee, if he enter under it, and claim the estate, is a disseisor. 5 *Pick.* 217, *Wait vs. Maxwell*.

It may be proper to remark here, that if a person undertake to convey land, to which he has no title, by a deed *with warranty*, and he afterward purchase the same land, or it come to him by descent, the title thus acquired will immediately enure, by way of *estoppel*, not only against the grantor, and those who claim under him, but against all strangers also, claiming under another title, *subsequently* acquired. 3 *Pick.* 52, *Somes vs. Skinner*. In like manner, if a person who is disseised, execute a deed with warranty, the grantee *not knowing* of the disseisin; if the grantor regain the seisin by judgment of law, the seisin thus gained will immediately vest in the grantee, and the title will be as available to him, as if his grantor had been seised at the time he executed the deed. *Ib.*; and see 9 *Cranch* 43, *Terrett vs. Taylor*; 9 *Wheat.* 454, *Mason vs. Muncaster*; 11 *Johns. R.* 97, *Jackson vs. Matsdorf*. But a warranty will not

bind a *right of entry*; consequently it cannot be pleaded or set up as a bar to a title under a term of years, or other chattel interest. *Co. Litt.* 389, a. For the only remedy of a termor is by entry, and ejectment, which, in the *English* practice, *assumes* that an entry has been made. Nor will it bar a mere *title of entry* by force of a condition, with a clause of re-entry; because, as lord *Coke* remarks, "for these no action doth lie." *Ib.* A party can never be restrained by way of estoppel, from maintaining an action, on the ground that the action is brought in violation of an executory covenant. 15 *Mass. R.* 106, *Gibson vs. Gibson.*]

SECT. VIII. By our law, in order to give effect to the lawful and honest intentions of the parties, a deed of land may be considered any species of conveyance, which is necessary to effect that object; and not repugnant to the terms of the instrument. 6 *Mass. R.* 24, *Marshall vs. Fisk*; [5 *Greenl.* 232.] For this purpose such a deed may be construed as a *feoffment*, and the acknowledgment and recording shall be deemed equivalent to livery and seisin. 5 *Mass. R.* 352, *Higbee vs. Rice*. [And where A. and B., his wife, conveyed her estate to C. and his heirs, to the use of the husband and wife, during their joint lives, and to the use of the survivor in fee; it was held, (upon the authority of *Thacher vs. Omans & al.*, supplement to 3 *Pick.* 521,) that the conveyance operated as a feoffment; and that the uses were well raised out of the seisin of C., and were executed by the statute of uses. 4 *Mason*, 45, *Durant vs.*

Ritchie.] So a deed, purporting in form to be a [13] bargain and sale to A. and his heirs, to the use of B. and his heirs, (in order to give effect to the intent of the parties,) has been construed as a feoffment, by which A. took the legal estate directly, and not by

way of use; and B. took the use, which was executed in him by the statute of uses. 6 *Mass. R.* 24, *Marshall vs. Fisk*. The reason of this construction is manifest. For if the deed had been regarded as a *bargain and sale* to A., the use to B. could not take effect, because it would be limiting *one use upon another*, which the law does not allow. And where husband and wife conveyed the wife's life estate by deed, to a remainder-man in tail, it was held to operate as an *extinguishment* of the life estate, and not as a *transfer* of it to the remainder-man. 3 *Mass. R.* 487, *Livermore vs. Bagley*.

[So where a release was made to one not in possession, for a valuable consideration, and duly recorded, it was held that it might be construed to be a bargain and sale, or other lawful conveyance, by which the estate might pass;—the recording of the deed being equivalent to *livery and seisin*. 7 *Mass. R.* 384, *Pray vs. Pierce*. And where a grantee of land, without taking actual possession, suffered his grantor to remain upon the land, as tenant for life, and received rent of him; and afterwards executed a deed of conveyance to a purchaser, for a valuable consideration, by *quit-claim and release*, in the form in common use in Massachusetts, which was duly recorded: it was held sufficient to pass the estate, though the releasee had no previous interest or possession. 8 *Pick.* 143, *Russell vs. Coffin*. Upon the same principle a bargain and sale from a parent to a child, to take effect after the death of the parent, has been construed as a covenant to stand seised to the use of the parent for life, with a vested remainder to the child in fee: because, if regarded as a bargain and sale, it would have been void, as a conveyance of a freehold to commence in *futuro*. 4 *Mass. R.* 135, *Wallis vs. Wallis*. In like manner, where a conveyance was made

by lease and release between brothers, for the consideration of natural love, and of £100, but to take effect after the death of the releasor; it was held to be good, as a covenant to stand seised. 2 *Wils.* 75, *Doe vs. Trammer.*

With respect to the *consideration*, it may be well to remind the student, that by the ancient common law no consideration was required to the validity of any deed. The distinctions between deeds which were voluntary, and those which were founded upon a valuable consideration, were introduced by the *courts of equity*; and from them afterwards adopted by the courts of law. By these rules no bargain and sale can be good, unless it is founded on a consideration of money, or something valuable, as a rent, a horse, and the like. Nor can a covenant to stand seised be good, unless it is founded on a consideration of blood, that is, *natural affinity*, or marriage. But it is not absolutely *necessary*, (though certainly proper,) that the consideration, in either case, should be expressed in the deed. If the proper consideration *existed in fact*, it may always be averred in pleading, and given in evidence. 3 *Prest. Abst.* 13: 16 *Johns. R.* 57. Where the consideration is expressed in a deed, without saying, *and for other considerations*, proof of any other consideration is inadmissible. 7 *Johns. R.* 341, *Maigley vs. Hauer*: 5 *Greenl.* 232, *Emery vs. Chase*. But if the consideration is not truly stated in the deed, it seems the party may have relief in equity, upon the ground of fraud or mistake. *Ib.* The statement of the consideration in the deed, (unless it is impeached as *fraudulent*, by creditors or purchasers,) is conclusive. And it is immaterial whether the consideration has been paid, or not; except in so far as there may exist a *lien* for the purchase money. But against

creditors, and purchasers for a valuable consideration, impeaching the deed as fraudulent, there must be proof that the consideration was actually paid, of whatever kind the deed may be. 3 *Prest.* 14.]

SECT. IX. *Seisin*, according to the strict import of the term, is only of *real and corporeal* property, as lands, houses, and the like; or something dependent on, or issuing out of lands, as reversions, seignories, and rents. Of these last, it is manifest there can be no corporeal seisin, and consequently no actual, or forcible disseisin. In order to explain this distinction, and the meaning of the term, as applied to incorporeal rights, it may be observed, that where a person had been disseised of land, and could not regain his seisin by entering [14] upon the disseisor, his only remedy, in early times, was a writ of entry. The difficulties and delays attending this remedy in those times introduced the writ of assize; the invention of which Mr. Reeves ascribes to Glanville, the celebrated Chief Justice of Henry II. *Reeves' Hist.* ch. 3. This remedy was found to be so prompt and convenient, that many persons in order to avail themselves of it, in cases of slight injury, surmised or admitted themselves to be disseised, by acts which did not really amount to an *actual* disseisin. This was therefore denominated a disseisin *by election*, in contradistinction to the other; it being in fact a disseisin, only as to the disseisor and disseisee; the latter, *as to every other person*, still continuing seised as before. The assize was *next* resorted to by those who claimed to be seised of the incorporeal rights before mentioned; and finally, by such as claimed offices, franchises, and the like, in the enjoyment of which they had been disturbed. These all necessarily complained of a *disseisin* of their several rights, because *for that injury alone* the assize was a proper remedy.

In all these cases, the party having no corporeal seisin, cannot have any remedy, *but by action*; and the disturbance of which he complains as a *disseisin*, is only so *by his election*. The books often mention the disseisin of incorporeal hereditaments and rights, where it is to be understood generally of disseisins *at the election of the party*, where he chose to consider himself as disseised, for the sake of the remedy by assize; and where he might have elected to consider himself *not disseised*. From this source arises much of the confusion and apparent contradiction in the old law writers, upon the nature and effect of a disseisin. For thereby the freehold can be acquired, *only when it is an actual disseisin*, and not merely when the party may *elect* to consider it a *disseisin*, or *not a disseisin*, at his pleasure. See 7 *Wheat.* 107, *Ricard vs. Williams*.

[As the subject of disseisin is very important, it may be useful to add a few illustrations. A simple disseisin then, is the entry by a stranger upon the possession of the person, who by himself or his tenant, has the actual freehold, and an *ouster* of that person. *Litt.* § 279. If several persons thus enter, and disseise another to their own use, they become joint-tenants by disseisin. But if they disseise him to the use of *one* of them, they do not become joint-tenants; but he to whose use the disseisin is made, is sole tenant, and the others have nothing in the tenancy. *Litt.* § 278. If A. disseise one to the use of B., who at the time knew not of it, but afterward assents to it; in this case, until the agreement of B. to the disseisin, A. is tenant of the land; and after the agreement, B. becomes tenant of the land:—but both are disseisors. The maxim is, *omnis rati habitio retrotrahitur et mandato aequiparatur*. *Co. Litt.* 180, b. While a man, either by himself or his tenant, continues

in possession of his house or his farm, no entry by a stranger can amount to an actual disseisin to him. For while he thus retains the possession, the seisin cannot be changed, or acquired against him, by such wrongful entry; according to the maxim, *duo non possunt in solido, unam rem possidere*. *Litt.* § 701; *Co. Litt.* 368, a. But if a man enter upon the land of another, claiming to hold it at *the will* of the owner; in this case, if the owner accept him, he becomes his tenant at will; but the owner may elect to treat him as a disseisor. So if a man demand and receive rent from my tenant; though he does not *ipso facto* gain the freehold,—yet I may *elect* to proceed against him as a disseisor. *Co. Litt.* 324, b. And where one enters, claiming *a term of years*, or a right to occupy, but without asserting any right to the freehold, the true owner may treat him either as his tenant, or as a mere trespasser, or as a disseisor. And if he treat him as a disseisor, it is a disseisin by election; since it was optional with the owner whether he would consider himself disseised or not. *Cro. Car.* 302, *Blunden vs. Baugh*.

Whether the entry of a *cestui que trust* upon his trustee, with a declared purpose of disseising him, would have that effect, has not, perhaps, been decided. Lord *Hardwick* seems to have admitted that there might be such a disseisin. 1 *Atk.* 591, *Hopkins vs. Hopkins*. There may be cases, as the insanity of a trustee, or his absence beyond sea, in which it may be highly expedient, that the seisin should be divested out of the trustee. In such cases Mr. *Preston* advises the *cestui que trust* to enter and make a feoffment, though he inclines to the opinion, that an entry by him, with a declaration of his intent to disseise the trustee, would be effectual, without a feoffment. 2 *Prest. Abst.* 392.]

SECT. X. By the common law, an *entry* was necessary in almost every case, either to *acquire* or to *regain* the actual seisin of lands. The purchaser entered upon the lands in order to receive the seisin by feoffment, or to acquire the *actual* seisin, where he already had the *seisin in law*, by a descent or devise to him. So also, where he had recovered lands by judgment of law, an entry was necessary to receive the actual seisin from the sheriff, under the *habere facias seisinam*. And where lands were conveyed upon condition, an entry was required, upon breach of the condition, to vest the seisin in him who had the right.

[16] There were, however, several cases, even at common law, in which the party acquired an effectual seisin in deed, without an *actual entry*. Thus where land was in lease for years, the husband might have *curtesy*, without an actual entry, or even the receipt of rent. *Co. Litt.* 29, a. n. 3. The same doctrine was also held with regard to seisin in the case of *possessio fratris*. And in Barwick's case, (5 *Co.* 94,) the like operation seems to be ascribed to *letters patent* under the great seal, which it is there expressly held, amount to a *livery in law*. It was therefore determined in that case, that the conveyance of a freehold by letters patent, to commence *in futuro*, was as much void, as if the conveyance had been by feoffment; because in neither case could there be a *present livery* of the future freehold estate.

[This doctrine, with regard to the effect of publick grants, is fully recognized by the Supreme Court of the United States, who held, that under the laws of Virginia, the whole legal estate and seisin of the commonwealth, in lands, pass to the patentee *upon the issuing of his patent*, in as full extent, (subject only to the rights of

the commonwealth,) as the commonwealth itself held them; and attaches to him all the legal remedies, incident to the estate: and that a patent at common law imports a *livery in law*. 8 *Cranch*, 248, *Green vs. Liter*. Where the legislature by a resolve authorized an individual to sell certain lands of the commonwealth, and he gave a deed in his own name *as agent*, and under his own seal: it was held that the grant was valid, and passed the title of the commonwealth, notwithstanding an adverse possession; *the commonwealth being incapable of being disseised*. It may be proper to observe, however, that the conveyance was held to be rather by force of the resolve, than of the deed, which only applied the legislative grant to its object. 6 *Pick. R.* 414, *Ward vs. Bartholomew*. And where the commonwealth is seised of lands by virtue of *an inquest of office*, the seisin must be deemed to continue, until the title is *lawfully parted with*, as it cannot be divested by disseisin. Such title may be transferred, by a resolve of the legislature *releasing* it; which may be construed as a *grant*, if necessary to give it effect. 4 *Mass. R.* 268, *Stokes vs. Dawes*.

But it has been held that a grant by the provincial government of *Massachusetts*, under the charter of *William and Mary*, conveyed no seisin to the grantee, against the province, without the approbation of the crown. 3 *Greenl.* 441, *Hill vs. Dyer*. And that the state, by virtue of its prerogative, is always seised of the lands to which it has title; and may therefore convey them by release, notwithstanding the intrusion of strangers upon them. *Ib.*]

In all conveyances deriving their effect from the statute of uses, the party to whom the conveyance is made, has a perfect seisin in deed, without livery or entry.

1 *Cruise*, 12; *Shep. T.* 223; *Co. Litt.* 271, *note*. The same operation is expressly given by statute to our common deed of conveyance, when perfected by acknowledgment and registry. *Mass. Stat.* 1783, ch. 37, § 4.

And generally, where the grantee takes *by matter* [17] *of record*, the law deems such a grant of equal notoriety with an actual tradition of the possession by livery, in view of the *vicinage*, according to ancient usage.

But the reason upon which the ancient rule of law was founded, which required an actual seisin by livery or entry, did not hold, when applied to a wilderness, such as this country was when our ancestors took possession of it, and as large districts of it remain to the present time. In such an uncultivated country, no notoriety of transfer could have been given by these means; and the reason ceasing, the rule does not apply. It has accordingly been generally held, that a conveyance of wild and vacant lands, gives a *constructive seisin in deed*, to the grantee; and he thereby acquires all the legal rights and remedies incident to such an estate. See 8 *Cranch*, 249, *Green vs. Lister*; 1 *Munf.* 142, *Celay vs. White*; 14 *Johns.* 406, *Jackson vs. How*.

When a person entitled to enter upon lands could not make his entry peaceably, or at least *safely*, the law allowed him to approach as near as he could, without danger, and there *claim the land to be his*; which would have the effect, for that time, of an entry. This claim might be repeated as often as there was occasion; and

when made once at least in every period of a year [18] and a day, it was denominated *continual claim*, and

had the effect to prevent his right of entry being lost, or taken away, by any limitation or descent, which might otherwise *toll* or defeat it. But continual claim

can be made by no one, who has not, at the time, a right of entry. *Litt.* § 416. It is defined by lord C. J. Dyer, to be "a challenge of the ownership, or propriety, that he hath not in possession, but is detained from him by wrong." *Plowd. Com.* 359. The *fear*, to excuse an omission to enter, must be a fear for his personal safety or liberty. If it be only a fear of destruction of houses, or goods, without any danger of personal hurt, it will not excuse the party; because, say the old law-writers, he may recover damages for the loss of his property. *Litt.* s. 420.—*Co. Litt.* 253, b.

The period of a year and a day, which often occurs in the old law, seems to mean nothing more than a *complete year*, including the whole of the first and last day of it. It was the time within which the feudal services must be required; and within that time, no *laches* attached. *Co. Litt.* 250, b. n. 1.

This provision of the ancient law, which had its origin in an age of lawless violence, occupies no inconsiderable space in the old books; but has long since become nearly obsolete, and is now scarcely regarded in any other light, than as one of the antiquities of legal learning.

SECT. XI. The most common occasion for an [19] entry on land, is in order to obtain the *actual seisin*, when withheld by some wrongful act of another, as a disseisin, abatement, or intrusion. And here it may be observed, that in this, as in most other cases relating to the acquisition and transfer of property, the effect of a party's act is generally *determined by the intent* with which it is done. [3 *Greenl.* 316, *Robinson vs. Swett & al.*] Where a party who is entitled to the seisin, makes an entry, the natural presumption is, that he intends to revest the estate in himself; and the law gives that

effect to his entry, without any express declaration of such intention on his part.

Thus it has been held, that if a *disseisee* enters into the land of which he has been disseised, and continues in it with the *disseisor*, claiming nothing of his original estate; yet this entry will reduce the estate, and restore to him the seisin. 2 *Danv. Abr.* 790. And if he enters and takes the profits, as lessee at will of the *disseisor*, or in any other manner, such entry will reduce the estate, unless a different intention is manifest on the part of the disseisee. So also, if he command a stranger to enter, or to put the cattle of such stranger upon the land to feed there; this is a good entry in law to revest the estate. *Ib.*, [and *Watk. L. D.* 64, &c.]

[20] But if A. make a lease for years to B., remainder in fee to C., and A. comes upon the land to make livery, and B. to receive it; this shall not be deemed an entry of B., to vest the actual possession in him, till livery is made; for then the remainder would be void, contrary to the intention of the parties. *Co. Litt.* 49, b. So, if the disseisee agree to release to the disseisor, upon the land, all his right, and enter accordingly for that purpose, and there deliver the release; this is a good release. And the entry, being only for the purpose of delivering the release, does not avoid the disseisin. *Co. Litt.* 49, b; *Lil. Conv.* 131.

Generally, where an entry is made, whether for a condition broken, to demand rent, to avoid a fine, or to revest the seisin, after an abatement, intrusion, or disseisin, it is made in the presence of witnesses, who are brought for that purpose, and to whom the intention of the party entering is expressly declared. And in all these cases, the entry should be peaceable and without force. [*Watk. L. D.* 62.]

Before the reign of Richard II. it seems that any person who had been recently disseised, was permitted to recover his possession *by force*. But this summary mode of doing justice to one's self, being productive of great disorder and violence, a statute of the fifth [21] year of that king directed, "that none from henceforth should make any entry into lands and tenements, but in cases where entry was given by the law. And in that case it should not be with a strong hand, nor with a multitude of people, but only in a peaceable and easy manner. And persons doing the contrary were to be punished by imprisonment, to be ransomed at the king's pleasure." Another statute of the fifteenth year of the same reign, authorized the Justices of the Peace to repair to the place, and if they found any that had *entered*, or who *held* forcibly, to commit such persons to the next gaol, there to remain until they made fine and ransom to the king. These statutes laid the foundation of the summary remedy for *forcible entry and detainer*, to which several others were added in the reigns of H. VIII, Eliz. and Jac. I., which are well explained in Burn's Justice.

The most important part of the provisions of these statutes are contained in our statute of 1784, c. 8, against forcible entry and detainer, which will be noticed hereafter; and similar regulations will be found in the laws of almost every state in the union. See 10 *Mass. R.* 403, *Commonw. vs. Dudley*; 8 *Johns.* 44; 10 *Johns.* 304; 4 *Bin.* 194; 3 *Harris and McHenry*, 438; 2 *Bay*, 355.

It should however be remarked, that if the de- [22] fendant sets up a title in himself, which is *found* for him, though he may be punished by fine, as a disturber of the peace, the plaintiff can recover no damages. *Co.*

Litt. 257, a. n. 1. If a person *who has right*, make a forcible entry, he may be *indicted*; but the wrong-doer, on whom he entered *with force*, cannot maintain an action of trespass for such entry. 4 *Johns.* 150, *Hyatt vs. Wood*. Because the plaintiff ought to have not only *actual*, but as to the defendant, *lawful* possession of real estate, to enable him to maintain trespass. 9 *Johns.* 61, *Stuyvesant vs. Tompkins & Dunham*.

SECT. XII. One occasion for an entry upon real property, which has not been particularly noticed and explained, is to take advantage of some condition annexed to an estate, when the condition has been broken. And it is a general principle of law, that he who would take advantage of such a condition which has been broken, must do it by making an entry, if he can; and if he cannot enter with safety to his person, he must make claim. For the law does not allow an estate of freehold or inheritance to cease, by mere breach of the condition, without entry or claim. And it will make no difference, though the conveyance contains an express *proviso*, that if the grantee do not pay a certain sum by such a day, *that then his estate shall cease* [23] *and be void*. *Co. Litt.* 218, a; *Plowd.* 133, b. It is also the same, as to the effect of the condition, whether the estate is conveyed by feoffment, bargain and sale, or by devise.

But where the fee is transferred by construction or operation of law, and the condition is broken, the estate will also be *revested* by like construction of law, without entry or claim. And generally he who may enter for breach of a condition, may also, at his pleasure, *waive the forfeiture* incurred by such breach. *Co. Litt.* 218, a; 1 *Conn. R.* 91, *Chalker vs Chalker*.

A condition may be inserted in a conveyance for the benefit of the grantor, or of the grantee. And its effect may be either to *revest* the estate in the grantor, as in the common case of a mortgage : or to *enlarge* the estate of the grantee ; as where the conveyance is to A. for life, with a condition, that if he does a certain act, or pays a certain sum of money, he shall have an estate in fee : or finally, the condition may be inserted for the purpose of *defeating* the estate of the grantee, if he shall fail to perform some stipulated act, or shall do some prohibited act ; as where a lease is made, upon condition that it shall be void, if the lessee shall fail to pay the rent, or shall assign the lease, without the consent of his lessor. 8 *Pick. R.* 284, *Gray vs. Blanchard*. [24] And it is this kind of conditions only, which are to be taken advantage of by *entry*. It may therefore be proper to subjoin a few remarks, 1. As to the *person* by whom an entry may be made for the breach of a condition. 2. As to the *time* when the entry may be made. 3. In what cases a *demand* must be made *before entry* ; and 4. As to the effect of such an entry in *defeating* the estate to which it is annexed.

1. It is a general rule, that no right of entry, or re-entry, can be reserved, or given to any other person, than the feoffor, donor, or lessor, &c. and their heirs or successors ; and such right of entry cannot be assigned or transferred to another. *Litt.* § 347. This principle had its origin in the policy of the ancient law, to guard by all possible means against *maintenance*, the subversion of justice, and the oppression of the poor, by the rich and powerful. For if men were allowed to grant before they obtain possession, as lord Coke remarks, pretended titles might be granted to great men, whereby

right might be trodden down, and the weak oppressed. *Co. Litt.* 214, a.

In the case of a bishop, prebend, parson, and the like, if the predecessor make a lease upon condition, the successor may enter for the condition broken, because they are privies in right. *Co. Litt.* 214, b ; 1 *Wood's Conv.* 11.

[25] It is not however to be understood, that the feofor, grantor, lessor, or heir, must *personally* enter for breach of a condition. An entry by any other person, by their express authority or command, will be as effectual as if made by themselves. And it seems, that even the entry of a stranger, *without any previous authority*, would be good to take advantage of a condition broken, if assented to afterwards by him who had a right to enter. 2 *Stra.* 1128, *Fitchet vs. Adams*. It has been held, however, that a bailiff could not enter for non-payment of rent, without a particular authority. *Hob.* 154.

In the case of a lease *for years* upon condition, the law is different. If the lessor grant the reversion to another, and the condition is afterwards broken, the grantee of the reversion may enter; for by the breach of the condition, the lease is *ipso facto* determined before entry. *Co. Litt.* 214, b ; 1 *Wood's Conv.* 11.

2. *The time* when an entry may be made for the breach of a condition, must of course depend upon the terms of the instrument or contract, by which it is reserved. Unless some other time is expressly limited, the entry may be made as soon as the breach is incurred. If the breach consists in the omission to do some

act by the grantee or lessee, it is always important,

[26] and sometimes difficult, to determine at what time his duty requires it to be done ; that is, whether the party has his *whole life* to do the act, or it is to be done

immediately, or within what the law denominates *convenient time*. But these questions may generally be resolved, by considering what was the reasonable intention of the party by whom the condition was reserved. There are, however, several rules of construction upon this subject, to which the student is referred. *Co. Litt.* 208, b. 219, a. b.

3. The principal case in which a *demand* must be made before entry, is where the entry is for non-payment of rent. For where a man makes a feoffment or other conveyance in fee, reserving to himself and his heirs a certain annual rent, payable at a particular day, with a condition, that if the rent should be behind and unpaid, that then it should be lawful for the feoffor or grantor, or his heirs to enter; yet if such party does not first demand the rent, he cannot lawfully enter. And the reason usually assigned is, that the land is the debtor; and therefore it is also held, that the demand must be *upon the land*, that being the place of demand appointed by the law. *Co. Litt.* 201, b; *Litt.* § 125. And generally where a penalty, as well as a re-entry is given for the non-performance of a condition, the forfeiture cannot be taken advantage of, without a demand at [27] the time prefixed. *Hob.* 82; *Moor*, 883; *Dy.* 51; 1 *Wood's Conv.* 11.

But if the rent be reserved to be paid at some other place, and not on the land, the demand must be made in the same manner, at the place appointed by the parties. *Co. Litt.* 202, a. If the reservation of the rent is with a condition, that if it shall be behind and unpaid for the space of ten or twenty days, after any day of payment, that then the feoffor may enter; in this case he need not demand the rent on the regular day of payment, but may

make his demand at any time before the expiration of the last day thus limited. *Ibid.*

Where the condition is, that if the rent is behind and demanded, the feoffor may *destrain*, (instead of entering,) he need not make the demand at the day appointed. He may demand it at any time after it becomes due, and the demand will authorize him to *destrain*. *Ibid.*

4. The entry of the feoffor or grantor for a condition broken, defeats not only the estate to which the condition is annexed, but all rights and incidents also, annexed to that estate, as dower, &c., and all the mesne incumbrances created by the feoffee or grantee, as mortgages, leases, and the like. And every such condition defeats the entire estate: it being an established [28] principle, that a condition cannot be so framed, as to make the same estate in land cease as to one person, and remain as to another; or to cease for a time, and revive afterwards. 6 *Co.* 40, b; 41, a. It is also a rule of the common law, that a condition cannot be *apportioned* by any agreement of the *parties*, so as to become void as to one part of the land, and remain in force as to the residue. See 4 *Co.* 120, a. b. But it seems there may be an apportionment of a condition by act of law. *Co. Litt.* 215, a. And a part of a condition may be good, though another part is void, being against law. *Ib.* 379, b; and see 202, b. n. 2.

If an estate be granted for life upon condition, and the remainder over, the entry of the grantor for breach of this condition will defeat the remainder, because it defeats the livery by which it was created. 2 *Danv. Abr.* 123; 1 *Wood's Conv.* 13. But there may be a condition of re-entry which will not defeat the estate of the grantee. As where it is not a general condition of re-entry for non-payment of rent; but the condition is only

that if the rent is not paid, the grantor shall re-enter *and hold until the rent is satisfied*. By such an entry, the grantor would gain no estate of freehold, but only an interest, by agreement, to take the profits in the nature of a distress. *Litt.* § 327.

With respect to the *demand of rent*, in addition [29] to what has been already stated, it may be proper to observe, that the demand must not only be upon the land, (unless some other place of payment is appointed,) but at the most notorious and public place. If there is a house, it should be demanded at the *front door* of the house; and a demand at the back door would be a void demand. If there is no house, or other building, it should be at the *gate*, or most public entrance upon the land. But it is not necessary to enter the house or come upon the land. The demand must also be so long before sunset of the day of payment, as to allow reasonable time to count the money. *Co. Litt.* 200, a. And if more than one quarter's rent, or one year's rent is due, it seems that only the *last* should be demanded, by him who would enter for non-payment. For the neglect to demand the *former* was a waiver of the condition as to that. *Lil. Conv.* 137; 1 *Wood's Conv.* 12.

SECT. XIII. The common law, in order to guard against the evil of maintenance, did not allow any person who had been disseised of real property, to convey his right to another, until he had regained the seisin. But he might relinquish it by a release to the disseisor; for that would rather prevent, than encourage [30] litigation. And this necessity of a *seisin*, to enable the owner to transfer his property, applied not only to a conveyance of it in his life time, but also to the transmission of it by devise or descent at his death.

1. Where the conveyance was by *feoffment*, if the owner had been disseised, but had not lost his right of entry, the act of entering to make the feoffment had the effect of revesting the seisin, which he was capable of instantly transferring to the feoffee. But while he was deprived of the seisin, and had only a right of entry or action, that right could not be assigned to a purchaser. *Co. Litt.* 266, a. Therefore, if the conveyance should be by *bargain and sale*, or *lease and release*, and the owner had been disseised, these conveyances would be inoperative, if made while the disseisin continued. Consequently it became necessary for the disseisee first to enter: and then he might execute the lease, or bargain and sale, with effect. But the more usual practice was to enter upon the land, and there to seal and deliver the conveyance. See 5 *Burr.* 2830, *Beck vs. Phillips*; *Run. on Eject.* 145.

[As it is highly important that the student should have correct views of the authority or power of the disseisor and disseisee, in relation to the subject matter of the disseisin, it may be useful to consider a little more distinctly the situation of each in this respect, and in several particulars to contrast the one with the other. The characters of disseisor and disseisee may be said to exist, or to be *applicable to the parties*, only so long as the disseisin continues in force. The seisin is *in* the disseisor, and *out of* the disseisee by the same act, and at the same moment; since the acquisition of it by the former, is the loss of it by the latter. For where there are conflicting claims and titles, the seisin cannot be in both of the parties; and the disseisee becomes, by the disseisin, incapable of exercising most of the powers or acts of ownership.]

During the disseisin, the disseisor may grant a lease to operate on his estate or interest, until it is defeated: but the disseisee cannot grant a lease, that can operate in any other way than by *estoppel*, to prevent his claiming the land against the lessee. If the disseisee make and deliver a lease, and after he has entered upon the land and restored the seisin, he make a second delivery, it would not give effect to the lease, because it was inoperative at its inception, and the second delivery of it was a nullity. It seems, however, that if the first delivery had been as an *escrow*, to be finally delivered after the entry, it might have been good. *Co. Litt.* 48, b. But this is denied by Mr. *Preston*; *Abst.* vol. 2. p. 400. See 2 *Bendl.* 81; 2 *Roll. Abr.* 25. The disseisor may make a *charge* upon the land by way of rent, or grant of an annuity, to continue until his title shall be defeated; and if the disseisee *confirm* the grant, he cannot avoid it, after his re-entry. But if, instead of a confirmation, the disseisee had released to the grantee of the annuity, a re-entry would have defeated it. *Co. Litt.* 300, a. The disseisee, on the other hand, can make no valid charge, to take effect at law, even after his seisin shall be restored. *Perk.* § 65. As the disseisor has the freehold, he may endow a woman who is entitled to dower, and it will be valid, since she could demand dower of no one else, while he was seised of the freehold. But a disseisee cannot endow a woman entitled to dower, even as against himself; though nothing in the law is more favoured than dower. *Perk.* § 426. So a disseisor may be a releasee of a *right*, or of a *title* of entry, from the disseisee, or from any other person, because he has the seisin or estate. But a disseisee cannot be a releasee of a *rent charge*, because he has no seisin or estate, in

which the rent can be extinguished. *Litt.* § 455; *Perk.* § 594.

As a deed of feoffment, by the ancient law, did not pass any estate until livery of seisin was made; if a disseisee make a deed of feoffment, and a letter of attorney to enter and take possession, and *then* to make livery *secundum formam cartæ*, it is a good feoffment. *Co. Litt.* 48, b.

But if the disseisor and disseisee should join in a feoffment or lease, it would be the feoffment or lease of the *disseisor*; though if the disseisee had entered, (while his entry was lawful,) and then made the feoffment or lease, it would then have proceeded from him. *Perk.* § 218. By disseisin an estate is acquired, which will be assets descendible to the heir of the disseisor; but the right or title of entry of the disseisee will not be assets in the hands of *his* heir, until the seisin shall be restored. 6 *Co.* 58, a. While the disseisor continues in the seisin, he may devise the estate: but it seems that neither the right of entry of the disseisee, nor his right of action to recover lands of which he has been disseised, is, *under any circumstances*, devisable. 8 *East*, 552, *Goodright vs. Forrester*. Finally, the disseisor is tenant of the freehold, and he only is the person to be sued in a real action for the recovery of the land, and not the disseisee; so that a part of the doctrine of lord *Mansfield*, in *Taylor vs. Horde*, 1 *Burr.* 60, should be adopted with caution. Perhaps it would not be too much to say, with regard to that case, that the correct legal doctrine is to be found in the argument of Mr. *Knowler*, rather than in the opinion of the court. See 1 *Taunt.* 578, *Goodright vs. Forrester*; *Co. Litt.* 330, b. n. 1.

Where two persons entered as tenants in common into lands, under a deed, which, being defectively executed, did not pass the estate, it was held that their occupancy, being *open and actual*, was a disseisin of the grantor. And a creditor of one of the tenants in common, having levied his execution on a moiety of the land, the original owner could not defeat the levy, by making a deed of the whole land to another person, without first avoiding the disseisin by a re-entry, or by judgment of law. 4 *Greenl.* 16, *Gookin vs. Whittier*. But the tenant's holding over after the expiration of his term, paying rent to a stranger, and refusing to quit upon the request of the agent of the lessor, was held not to be such a disseisin of the lessor, as to defeat the operation of his deed, by which he undertook to convey the premises to a third person. 3 *Greenl.* 188, *Porter vs. Hammond*.

In the case of land mortgaged, if a stranger, by taking possession of it, disseises the mortgagor, it is a disseisin of the mortgagee also ; and so long as the disseisor continues in possession, the mortgagee cannot convey his interest in the land by his deed, *without first making an entry*. But the disseisin of the mortgagee will be deemed to extend (where the disseisor has erected buildings upon the land,) no further than the land is covered by buildings, or is otherwise in the actual and exclusive possession of the disseisor, or his tenants. 8 *Pick. R.* 272, *Poignard vs. Smith*.]

Where the tenant in a real action pleads in bar the deed of the demandant to a stranger ; if at the time the deed was executed, the grantor was disseised, he may reply to such plea, that nothing passed [31] by the deed. For he who is entitled to recover, is not barred by the execution of a deed, purporting to

be a conveyance of the demanded premises, but by which his right did not pass; unless it be by way of *estoppel* between the parties to the deed. 6 *Mass. R.* 418, 421, *Wolcot vs. Knight*; 14 *Mass. R.* 200, *Knox vs. Kellock*; 1 *Johns. R.* 163; *ib.* 159; 5 *Johns.* 489; 2 *Day*, 151.

[The subject of estoppels derived from a warranty of lands has been already briefly noticed, p. 10. A few remarks will here be added respecting estoppels which arise from conveyances, recitals, acceptances, and records. And in the *first* place, from the solemnity of a *feoffment*, which necessarily transferred the fee simple from the feoffor to the feoffee, by right or by wrong, the feoffor was never allowed to make any claim to the estate, though he had acquired a title to it from a stranger *after* the feoffment. *Co. Litt.* 352, a. But at the common law, a naked grant, release, or confirmation, did not, *in a court of law*, amount to an estoppel. For no title *not in esse* will pass by a deed, unless it contain a warranty. 14 *Johns. R.* 193, *M'Crackin vs. Wright*.

But where a person makes a conveyance of land, in which he has no interest at the time, but afterward acquires a title to the land, *he will be estopped* from claiming it, in opposition to his deed, either against his grantee, or any person deriving title under him. 12 *Johns. R.* 201, *Jackson, ex dem. Danforth vs. Murray*; 13 *Johns.* 316, *Stevens vs. Stevens*; 5 *Day*, 88, *Coe. vs. Talcot*. A deed of partition operates as an estoppel, between the parties, and all persons claiming under them. 3 *Johns. R.* 331, *Jackson, ex dem. Ostrander vs. Hasbrouck*.

With respect to a *recital*, it is said by lord Coke, that it doth not *conclude*, because it is no direct affirmation. *Co. Litt.* 352, b. And to the same effect it is affirmed by *Finch*, that recitals shall not make an estoppel, for

they are not material. *Finch's Law*, 33. But the more modern doctrine is certainly different. 1 *Rolls Abr.* 872; *Com. D. Estoppel*, A. 2; 17 *Mass. R.* 601, *Bean vs. Parker & al.* A recital in a will is held to be an estoppel to parties claiming under the will. 3 *Johns. Cas.* 174, *Denn vs. Cornell.*

An acceptance of an estate may estop the parties to whom it is made; as where a husband makes a feoffment of the land of his wife, and takes back an estate to himself and his wife for life, by which the wife is remitted: yet in an action of waste brought against the husband and wife *he* is estopped to shew such *remitter*. *Litt.* § 666, 7. So a lessor is in many cases estopped by acceptance of rent. *Co. Litt.* 352, a. If a man accept a lease by *indenture* of his own lands, paying rent, he is estopped to deny the interest of the lessor. But if he takes a lease of the herbage of his own lands, it seems he is not thereby estopped. *Co. Litt.* 47, b. And although the lease does not *enure by way of estoppel*, yet it is generally true, that the tenant will not be allowed to dispute his landlord's title in an action of covenant. 3 *T. R.* 14, *Doe vs. Porter.*

Matters of record, enumerated by lord *Coke*, by which a man may be estopped, are letters patent, fines, recoveries, pleadings, taking a continuance, confession, imparlance, warrant of attorney, admittance, &c. *Co. Litt.* 352, a.]

2. To give effect to the *devise* of real property, it is necessary that the testator should not only be *seised*, at the time of executing his will, but he must continue seised until the time of his death. If, after devising lands, the testator is disseised, and dies without entering upon them, the devise becomes void. Therefore in an action brought by the devisee, it is said to be a good

plea that the devisor did not die seised. *See Bro. Abr. Devise, pl. 15*; 11 *Mod. 128, Bunker vs. Cook*; *Cowp. 205, Hogan vs. Jackson*; 10 *Mass. R. 131, Poor vs. Robinson*; 8 *Ves. 282*. But if the devisor re-enters, the devise again becomes valid; for after the re-entry, the disseisee is considered as never having been disseised. 4 *Burr. 1961, Roe, ex dem. Noden vs. Griffiths*. If a testator, after he is disseised, devise all his right to the disseisor, it seems that such a devise is not inoperative, but may take effect as a release. 10 *Mass.*

R. 131. Where a conveyance of land was obtained by *fraud and imposition*, and the deed was afterwards acknowledged and recorded, it was held not to amount to such a disseisin, as disabled the grantor to pass the estate, by a will previously executed. 15 *Mass. R. 113, Smithwick vs. Jordan*. A republication of a will, containing a general devise of all the lands of which the testator shall die seised, may pass after acquired lands. But it seems that such republication, to give it that effect, must be made with the *same solemnities* as the original will. 9 *Johns. 312, Jackson, ex dem. Rogers & als. vs. Potter*.

[It seems to have been formerly understood that contingent or executory interests in lands were not devisable. But in modern times a different doctrine has been adopted; and it is now held that a possibility, coupled with an interest, is devisable. 1 *H. Bl. 30*; 3 *T. R. 88, Jones & al. vs. Roe, lessee*. But a mere right of entry, (and *a fortiori*, a right of action to recover land,) cannot be devised. *Goodright vs. Forrester, 8 East, 552*; 1 *Taunt. 578, S. C.*]

3. The rule of law, as to the transmission of title by descent, is briefly expressed in the maxim of *Fleta, seisi-na facit stipitem*. It is thus stated by lord Coke. "A man that claimeth as heir in fee simple to any man by

descent, must make himself heir to him, that was last seised of the *actual* freehold and inheritance." *Co. Litt.* 11, b. And lord *Hale* remarks, that the last *actual seisin* in any ancestor, makes him as it were the *root* of the descent, equally, to many intents, as if he had been a purchaser; and therefore he who cannot derive his succession from him who was *last actually seised*, shall not inherit. *Hist. Com. Law*, c. 11, p. 267. And generally, he who acquires an estate in lands by descent, (which before entry gives him only a seisin *in law*,) [33] must gain a seisin *in fact*, or actual seisin, before he can transmit such lands to his heir. *Co. Litt.* 11, b.; 15, a.; [2 *Prest. Abst.* 440.] But where the ancestor acquires the estate by *purchase*, that is by his own act, there is some relaxation of the strictness of the rule. And several cases are mentioned, in which he is allowed to transmit to his heirs an estate of which he was never *actually seised*; as where one party dies, after an exchange, but without having entered. See 1 *Co.* 98, b.; *Cruise, Tit.* 29, ch. 3, § 8.

The rule of the common law upon this subject is adopted in Massachusetts; and, with some modifications by statute or usage, in several of the other states. It has been considered, however, that the situation of lands, in the unsettled parts of this country, made it necessary to apply with some limitation, the rule, which in *England* requires a seisin in fact, in order to transmit real property by descent. And it has been deemed no departure from the spirit and substance of the *English* law, to consider the ownership of wild and vacant lands equivalent to an *actual seisin*. 14 *Johns.* 406, *Jackson vs. Howe*. The same principle has also been applied to another analogous case; and the ownership of wild and uncultivated land by the wife, has been

held a sufficient seisin in her, to entitle the husband to be tenant by the curtesy. 8 *Johns.* 269, *Jackson vs. Sellick.* And see 1 *Munf.* 162, *Clay vs. White* ; 3 *Munf.* 285, *Davis & wife vs. Martin.*

In Connecticut, the maxim *seisina facit stipitem*, it is said, is wholly disregarded. And the practice has always been, that upon the death of an ancestor, the descent was cast upon his heir, without any regard to the fact of an actual seisin by such ancestor ; and the right of such heir to the real property of the intestate, has always been considered the same, as his right to the personal property. 3 *Day*, 210, *Hillhouse vs. Chester* ; 4 *Day*, 306, *Rush vs. Bradley.*

SECT. XIV. By the law of Massachusetts, mortgages are foreclosed by *entry* upon the mortgaged premises, taking actual possession thereof, and continuing such possession *three years*, without any decree of foreclosure, or other judicial act. The entry must be *after condition broken*, and either "by process of law," that is, under a judgment of a court of law, "or by open and peaceable entry, made in the presence of two witnesses." *Mass. Stat.* 1785, ch. 22, § 2 ; 1798, ch. 77, § 1. The manifest design of the legislature, in allowing an entry to be made without a suit at law, is to save the mortgagor, who is willing to yield the possession to his mortgagee, the expense which would be occasioned by a suit. The entry must be *open and peaceable*, and *actual possession* must be taken. It seems, therefore, that it cannot avail the mortgagee, if it is made forcibly, *without the consent*, or at least against the will, of the mortgagor or his assignee : and that where the entry is opposed or resisted by the mortgagor, the mortgagee must resort to his action. [34] [35]

[But it is not necessary that the mortgagee should make a declaration of the purpose for which he enters, or that he should have his deed with him. It is sufficient if the mortgagor has notice of the entry, and that it was made on account of the non-performance of the condition. And possession may be delivered by an agent of the mortgagor, at his request, without any written authority. 4 *Pick. R.* 468, *Skinner & al. vs. Brewer*. If the mortgagee make an entry *in pais*, pending an action on the mortgage, and, after obtaining judgment, enter under a writ of possession, the last entry will be deemed a waiver of the right to foreclose by virtue of the first entry. 5 *Pick. R.* 418, *Fay vs. Valentine*.]

The object intended by the law is, that the mortgagor or his assignee *may have notice* when the three years will commence, at the end of which his right to redeem will cease. If therefore the entry is without his knowledge, though in the presence of two witnesses, it will not avail, unless it is followed by continued possession. 17 *Mass. R.* 429, *Thayer vs. Smith*. And see 7 *Pick. R.* 29, *Hadley & ux. vs. Houghton*.

After the making of a mortgage, the mortgagee has immediately the same right to enter, (with or without judgment and execution upon a writ of entry,) that he would have if the conveyance were absolute. [And where the entry is *before the condition is broken*, it is not necessary to the validity of the entry of the mortgagee, that the mortgagor or his assignee should have notice of it. 4 *Pick. R.* 216, *Reed vs. Davis & al.*] But the mortgagee thus entering must account for the rents and profits, if the mortgagor should perform the condition, or, after the breach of it, should redeem the estate. And upon the performance of the condition, the title of the

mortgagee becomes absolutely void, so that the mortgagor may enter upon the estate, or recover it by suit at law.

But if *after* the mortgagee has obtained possession, the condition is broken, the *three years* [36] do not commence immediately, *without notice* to the mortgagor. If the mortgagee thus in possession, after condition broken, would foreclose the mortgagor's right of redemption; (as he now can make no entry,) he must give *notice* to the mortgagor, that from henceforth he shall hold the possession *for the purpose of foreclosing*: and from the time of such notice the three years will commence. 2 *Mass. R.* 496, *Erskine vs. Townsend*; 3 *Mass. R.* 155, *Newal & al. vs. Wright*.

[If there are several conditions in a mortgage, as where the debt is payable by instalments, and the mortgagee enters for non-payment of the first instalment, the other conditions not having been broken, the mortgagor may prevent a foreclosure by tendering payment of so much as has become due and payable: and upon a bill to redeem, he will have a decree for possession, unless the mortgagee shall set up his general right under the mortgage, in which case there may be a special decree, which shall avoid the *effect of the entry* for condition broken, and leave the mortgagee in possession according to his legal rights. 5 *Pick. R.* 259, *Saunders & al. vs. Frost*.]

So if a lessee in possession takes a mortgage of the demised premises, and afterwards the condition is broken, he shall be considered as holding under the lease, while he continues to pay rent, and until he shall give notice to the mortgagor of his election to hold under the mortgage; or at least, until he shall do some act, *showing an intention* to hold under the mortgage, as refusing to pay rent. 3 *Mass. R.* 155, 156, *Newall & al. vs. Wright*.

On the other hand, if the mortgagee is in possession, after the condition is broken; or if a tenant in possession takes an assignment of a mortgage of the same premises, after the condition is broken, the mortgagor, or purchaser of the equity of redemption, to secure his rights, *may elect* to consider him in *claiming to foreclose*, though he has given no notice that he [37] was holding for that purpose. 12 *Mass. R.* 519, *Pomeroy vs. Winship*.

[Where the legal and equitable interests in the mortgaged property become united in the mortgagee, the mortgage will be considered as subsisting, or not, according to the intention of the mortgagee, actual or presumed. If no intention is indicated by any act of the mortgagee, the court will generally consider what would be most for his interest. If it appear wholly indifferent, the charge or incumbrance of the mortgage may be treated as merged. 3 *Greenl.* 260, *Freeman vs. Paul*; 3 *Pick. R.* 475, *Gibson vs. Crehore*; 5 *Pick. R.* 146, *same parties*.]

It seems that a mortgagee of a remainder or reversion may have the same remedy by entry, as well as by action, as the mortgagee of an estate in possession. 13 *Mass. R.* 429, *Penniman vs. Holkis*. Heirs, as such, have not any title or interest in a mortgage to their ancestor, that will enable them *to enter*, or maintain an action for condition broken. 16 *Mass. R.* 18, *Smith & al. vs. Dyer*. Neither can a *cestui que trust* enter, or maintain an action, to foreclose a mortgage to the trustee. *Ib.* 348, *Somes vs. Skinner*.

Though the mortgagee has an undoubted *legal* right to enter before condition broken, where there is no covenant or proviso to the contrary; yet where the mortgaged lands, without the profits, are a sufficient pledge

for the debt and interest, there is no inducement for him to enter and receive the rents and profits, for which he must account. [4 *Pick. R.* 216, *Reed vs. Davis & al.*] And if a mortgagee should be guilty of any *oppression*, in entering upon the mortgagor, and turning him out of possession, before any breach of the condition was incurred, he would undoubtedly be held to account for the *utmost* that could be made from the profits of the [38] estate, though it might exceed what he had actually received from it.

SECT. XV. The next thing to be considered, is the extent of the seisin acquired or lost, by the several acts which have been mentioned. And it is a general principle, that such a construction is to be put upon all acts affecting the seisin of real property, as is most *in furtherance of right, and suppression of wrong*. Therefore, when a man is once seised of land, his seisin is presumed to continue, until a disseisin is proved. And where he is already seised, or by his entry acquires a seisin, though his acts are confined to a particular part, he is deemed to be seised of the *whole parcel* to which he has title: for entry on a part is entry on the whole. 8 *Cranch*, 245, 246, *Green vs. Lister*; 4 *Mass. R.* 416, *Kennebeck Purchase vs. Springer*.

Generally, where a person is found in the possession of land, claiming it as his own, in fee, it is at least *prima facie* evidence of ownership and seisin of the inheritance. But it is not the mere fact of possession, but the *claim of ownership accompanying the possession*, which gives this legal effect to the acts of the party. Possession, of itself, evidences only present occupancy *by right*; because the law will not *presume a* [39] *wrong*. But such a possession, it is to be remembered, is as consistent with an estate for life, or

years, as in fee. The quality and extent, therefore, of the interest of the party in possession may be deduced from collateral circumstances. For this purpose, *both the acts and declarations* of the party, while in possession, may be proper evidence; and he will not be presumed to have a higher title than he claims.

[To constitute a disseisin, the possession of the disseisor must have been *adverse to the title of the true owner*, as well as open, notorious and exclusive. And the parol declarations of a person in possession of land are admissible to show the character and intent of such possession, not being within the statute of frauds. 2 *Greenl.* 242, *Little vs. Libby.*]

On the other hand, if he is in under title, though ignorant of the extent of his right, the law will adjudge him in possession according to that right. For a mistake of the law will not in such a case prejudice the rights of the party. 7 *Wheat.* 105, *Ricard vs. Williams*; *Litt.* § 695; [5 *Greenl.* 204.]

If there is a *concurrent possession* of lands, the seisin will be adjudged to be in him who has the right; for although there may be a concurrent possession, there cannot be a concurrent *seisin*. 3 *Mass.R.* 215, *Langdon vs. Potter*; 10 *Mass. R.* 146, *Codman vs. Winslow*. But on the other hand, where one enters unlawfully, he does not acquire a seisin beyond his *actual and exclusive occupation*; for the party seised can no farther be considered as ousted. 8 *Cranch*, 250, *Green vs. Liler*; 4 *Mass. R.* 416; [8 *Pick. R.* 272.] Where the lands are uncultivated, to constitute a disseisin by the entry and occupancy of the land by a party *not claiming title*, the occupation must be of such a nature and notoriety, [40] that the owner may be *presumed to know* that there is a possession adverse to his title. The causing a sur-

vey, and marking the lines of such lands, by one who does not claim title, is not a disseisin of the owner ; neither is the occasional cutting of the grass. 4 *Mass. R.* 416.

Generally, the owner of lands is not disseised by an entry upon them, or other act of trespass, of which he had no notice. 7 *Mass. R.* 381, *Pray vs. Pierce* ; [3 *Greenl.* 316, *Robinson vs. Swett.*] [A disseisin may however be effected without the *actual* knowledge of the owner of the land, by acts of notoriety, as by enclosing the land with a fence, or by erecting buildings on it ; such acts being necessarily regarded as *constructive notice* to all the world. 6 *Pick. R.* 172, *Poignard vs. Smith.*] Where a person having no title, enters upon lands, and at a subsequent period commences a more visible, permanent, and notorious occupancy, as by fencing, or the like ; in favour of the party having right, he shall be deemed to be disseised by the *second* entry, and not by the *first*. 10 *Mass. R.* 93, *Brown vs. Porter* ; [5 *Pick. R.* 131, *Brimmer vs. Proprietors of Long Wharf.*]

SECT. XVI. The possession or entry of one tenant in common, or joint-tenant, is always presumed to be in maintenance of the right of all ; and he shall not be presumed to intend a wrong to his companions, if his acts will admit of any other construction. [2 *Prest. Abst.* 291.] The mere pearnancy of the profits by one, shall not be considered, of itself, as an ouster. 5 *Mass. R.* 344, *Higbee vs. Rice.*

If there are several tenants in common, who are *co-heirs*, the entry of one will not be deemed adverse [41] to the title of the others, without the *strongest evidence* of exclusive claim of title to the whole estate. [1 *Pick. R.* 114, *Shumway vs. Holbrook.*] But one heir

may disseise his co-heirs, and hold an adverse possession against them, as well as against a stranger. An *ouster* or disseisin is not generally to be presumed, from the mere fact of sole possession. But it may be proved by such possession, if accompanied with a notorious claim of *exclusive right* to the property in question. 7 *Wheat.* 120, *Ricard vs. Williams.* [3 *Greenl.* 207, *Williams vs. Gray.*]

If one tenant in common enter into the *actual* and *exclusive* possession of the lands, taking the whole rents and profits to his own use, and openly asserting his own exclusive property in the lands, denying the title of any other person, it is an adverse possession by him, and those claiming under him, and an ouster of the other tenants. 10 *Mass. R.* 464, *Cummings vs. Wyman*; [1 *Greenl.* 89.] So, if one tenant in common enter into the whole of the estate, under a deed duly acknowledged and registered, from one who has no title, it is an actual disseisin of his companions. 5 *Mass. R.* 352, *Higbee vs. Rice*; [4 *Mason*, 326, *Prescott vs. Nevers.*]

SECT. XVII. It has been already mentioned, that where the lands to be conveyed were in different counties, it was necessary to make livery of seisin in each county, in order to vest the seisin in the feoffee. *Ante*, § 3. The same rule generally holds with regard to an entry. When the same person has disseised the owner of lands lying in different counties, it is necessary, in order to revest the seisin, to make an entry in each county. [*Watk. L. D.* 61.] But if the lands are all in the same county, the entry on one tract, in the name of the whole, is sufficient; unless the disseisin was of several distinct parcels, by several persons; for in this case there must be an entry into each parcel. 8 *Cranch*, 250, *Green vs. Liler & al.*

The general rule of law is, that the entry, to revest the freehold or inheritance, should correspond to the remedy which the same party might have by action. The consequence is, that the effect of an entry can extend to such lands only, as the party entering could have demanded in the same writ of entry. *Co. Litt.* 252, b; *Co. Law. Tr.* 264.

In several cases, the entry of *one* person may enure to the use of *another*. The case of joint-tenants and tenants in common has been already alluded to; and there are other cases of the same sort. The husband may enter for the wife, where her entry is lawful, and it will revest the possession, even without her assent. And

if one enters to the use of an infant, it is valid, [43] before any assent by the infant. 1 *Wood's Conv.*

8; [*Co. Litt.* 258, a; 3 *Pick. R.* 246.] So if he enters for a person of full age, where the entry is lawful, it will revest the possession before any agreement. *Ibid.* The wife also may enter in the husband's name, and if he agrees to it afterwards, it is the same as an entry by himself. *Crp. Eliz.* 72. And many other cases of the like kind may be found in the books. *Vin. Abr. Entry*, C, D, F; 1 *Wood's Conv.* 7, 8, 9; [*Watk. L. D.* 66; 1 *Saund.* 319, n. 1.]

SECT. XVIII. Several acts have been noticed in the course of the preceding remarks, which, in favour of him who had a legal right to enter, have been deemed sufficient in law, to avail him as an actual entry. But some further observations upon the subject may be useful to the student.

With regard to an *entry*, as well as an *ouster*, the intent generally determines the character, and consequently the effect of the act; according to the maxim of lord Coke, *affectio tua nomen imponit operi tuo*. *Co. Litt.*

49, b; [3 *Greenl.* 316.] The intent may sometimes appear from the act; at other times only from the declarations of the party: but when both are taken into view, it will be still more manifest. *Co. Litt.* 245, b.

The mere act of going upon the land, or entering the house, will not always constitute a legal entry, sufficient to vest the actual seisin in him who has the right. Thus where the disseisee, at the request of the [44] disseisor, went into his cellar to see the antiquity of it; this was adjudged to be no *entry* by the disseisee. *Plowd.* 92, 93. So if one is invited to dine at a house to which he makes claim, his going into the house for that purpose shall not be deemed an entry, to vest the possession in him, though he has the right. *Co. Litt.* 368, a; [*Watk. L. D.* 63.] And where the demandant went into the house with a jury, on a view, it was held to be no entry; for in order to constitute a legal entry, the party must go upon the premises with that intent. *Plowd.* 93.

But where the act is done with an intention to enter, it will generally be sufficient to go upon any part of the land. If there is a house upon the land, an entry into the house to which the land appertains, with a claim of the whole, is a good entry to revest the seisin of the land, as well as the house. But it is said, that if it be merely an entry into the house, claiming the house only, it will not avail as to the land. 1 *Lill. Abr.* 515. Where a person attempts to make an entry, and in the act of entering is resisted, (as where one is entering by the window, and only a part of his body being within the house, he is dragged out by the heels,) it is a sufficient entry. *Watk. L. D.* 61; *Bro. Seisin*, 20, 23.

In the case of a lease for years, it is generally [45] necessary that the lessee should enter, in order to acquire the possession, so as to be capable of receiv-

ing a release, or maintaining an action of trespass. But this must be understood as applying only to leases at the common law: for a lease by bargain and sale, or by way of use, is completely executed by the statute of uses, without an actual entry. [See 2 *Prest. Abst.* 298.] If the lessor die before the entry of the lessee, he may still enter afterwards. And if the lessee die before entry, his executor or administrator may enter. So if the lease is made to two or more, the death of one does not prevent the entry of the others. *Co. Litt.* 246, a.

As to the ceremony of making an entry, it is usually the same, whatever may be the purpose for which it is made. The common direction is, that if it be a house, and the door is open, the party entering should go into the house, and say, *I here enter and take possession of this house*. If the door is shut, he should place his foot upon the ground-sill, or against the door, and make the same declaration. And where the entry is to be made upon land, the person who makes the entry may go upon any part of the land, declaring the purpose for which he enters as before. See 1 *Lill. Abr.* 515. If

the party enters as attorney or agent to some other [46] person, he should declare in whose behalf, or to whose use, he makes the entry.

[But where there is no person upon the land, claiming it by adverse title, the mere entry by the attorney or agent, for the purpose of taking possession, or making claim to it, is sufficient without any declaration of the purpose for which he enters, or of his authority. For such a declaration would be nugatory; *et lex non cogit ad vana seu inutilia*. 4 *Pick. R.* 160, *Tolman vs. Emerson*.]

Care should always be taken to make the entry in the presence of at least two or three witnesses of unexceptionable character. And it is a very proper and

prudent precaution, to have the witnesses put their signatures to a memorandum, stating briefly the fact and the time of the entry.

SECT. XIX. The fictitious action of ejectment, where adopted, has in most cases superseded the necessity of an actual entry into lands; the "*confession*" of the entry being held, agreeably to the practice of the English courts, equivalent to such entry. Therefore, generally, whenever the party has a right of entry, he may maintain an ejectment, but not otherwise. The principle, as laid down by *lord Mansfield*, is, "that where an entry is necessary to *complete the landlord's title*, there the *confession* of lease, entry, and ouster is sufficient; but that where it is requisite, in order to *rebut the defendant's title*, as where a fine is to be avoided, an actual entry must be made." *Doug. 477, Goodright vs. Cator*. But incorporeal hereditaments, and things which lie in grant, can neither be divested nor restored by entry. [It seems requisite therefore, in order to give to the heir such a seisin of this kind of property, as to constitute him the *stock of descent*, that he actually receive the rent or other emolument. For although a seisin in law might entitle the husband to be tenant by the curtesy; yet it will not be sufficient to turn the descent into a new channel;—but an actual seisin must be acquired. *Watk. L. D. 77.*]

By our statute of limitations, (in conformity to the English statute of 21 *Jac. I. c. 16*,) no entry shall be made by any person upon any lands, unless [47] within twenty years after his right shall accrue; with certain savings in favour of *infants, femes covert, persons non compos mentis, imprisoned, or beyond sea*. [And it seems to be a general rule, which is applied to all statutes of limitation, that after the statute has once

commenced to run, it will continue, notwithstanding any *subsequent* inability which may happen to arise. See the cases collected in *Com. Dig. (Day's ed.) Temps.* (G. 1, a.)

Where there is a descent of real property to several persons as joint-tenants, tenants in common, or co-parceners, only those who are subject to the disability, will be entitled to the benefit of the saving clause in the statute. So held as to joint-tenants, 7 *Cranch*, 156, *Marsteller vs. M'Clean*; as to tenants in common, 5 *Day*, 211, *Bryan vs. Hinman*; and as to parceners, 2 *Taunt.* 441, *Langdon & al. vs. Rowleston*; 4 *Day*, 310, *Sanford vs. Button*.

The statute of limitations in regard to an entry on lands, does not begin to run until after the right of entry has accrued. So that where a *feme covert* dies seised of lands, and her husband becomes tenant by the curtesy, the statute does not begin to run against her heirs, until the death of the husband. 3 *Conn. R.* 191, *Clark vs. Vaughan*. *Vide* 3 *Binn.* 374, *Hall vs. Vandegrift*. As a remainder-man or reversioner cannot make an effectual entry during the continuance of the particular estate, the statute, as to them, does not commence running, until such particular estate is determined. 15 *Mass. R.* 471, *Wallingford vs. Hearl*; and see 4 *Johns. R.* 390. It may be proper to add, that the rule as to the limitation of actions depends in all cases upon the provisions of the *lex fori*. 1 *Caines' R.* 402, *Nash vs. Tupper*; 5 *Johns.* 132, *Hubbel vs. Cowdry*; 2 *Mass. R.* 84, *Pearsall vs. Dwight*; 3 *Conn. R.* 472, *Medbury vs. Hopkins*; 3 *Johns. Ch. R.* 190, *Decouche vs. Savetier*. The term "*beyond sea*," in the saving of a statute of limitations, is equivalent to, "*without the limits of the state*," where the statute was enacted; and a party who

is without those limits is entitled to the benefit of the exception. 3 *Wheat.* 541, *Murray vs. Baker.*]

The English statute of 4 and 5 *Anne*, c. 16, provides, "that no entry shall be of force to satisfy the statute of limitations, or to avoid a fine levied on lands, unless an action be thereupon commenced within one year after, and prosecuted with effect." This provision has not been inserted in our statute. It does not appear to have been adopted by the courts in Massachusetts, before the revolution, and therefore is not applicable to our practice. It seems, however, that an entry, in order to avoid the statute of limitations, must be an entry for the *express purpose* of taking possession. 4 *Johns.* 390, *Jackson vs. Schoonmaker*; see *Watkins' Law of Descents*, 63; [3 *Greenl.* 316, *Robinson vs. Swett & al.*]

CHAPTER I.

Of the Remedies for Injuries to Real Property, which amount to an Ouster.

SECT. I. INJURIES affecting real property, are [48] chiefly of two kinds. *First*, Those which disturb the owner in the enjoyment of it, or diminish its value, without depriving him of the possession. *Secondly*, Those that deprive him of the possession, and usurp his right of dominion over the property. Of the first class are *Trespass, Nuisance, Waste, and Disturbance*. The remedies for these injuries are the same with us, as by the law of England; and with the exception of some slight modifications by statute, the *Practice*, by which these remedies are enforced, is also nearly the same.

The other kind of injury, attended with an amotion from, or usurpation of, the possession, is denominated an *ouster*. It includes, where the subject of it is an estate of freehold, *Abatement, Intrusion, Disseisin, Discontinuance, and Deforcement*. [Of these, the three first proceed from strangers; and in this respect a remote heir is regarded as a stranger. The other two arise from acts done by a person already *in the seisin*, but having only a particular estate, and not the whole fee.]

[49] 1. That kind of injury to real property, which is by the common law denominated an *abatement*, is where a person dies seised of an estate of inherit-

ance, and a stranger wrongfully enters and takes possession, before any entry is made by the heir, to whom the inheritance descends, or the devisee, to whom it has been devised. [3 *Bl. Com.* 167; *Finch*, 195.]

2. An *intrusion* is the wrongful entry of a stranger upon the land, after an estate for life in it has been determined, and before any entry by him who has the remainder or reversion. It is indeed *the same injury* to the remainder-man or reversioner, that an abatement is to the heir or devisee. [3 *Bl. Com.* 169; *Co. Litt.* 277.]

3. A *disseisin*, as has been already stated, is the unlawful act of turning out him who is *seised of a freehold*, and usurping his dominion over the property. [3 *Bl. Com.* 169; *Co. Litt.* 277.]

4. In the ancient law, an estate was said to be *discontinued*, when, in consequence of some conveyance made by a person *whose possession was lawful*, he who was entitled to it, could not recover his right by *entry*, but was obliged to resort to an action for that purpose. [*Finch*, 190.] It was chiefly applied to alienations by husbands seised *jure uxoris*, ecclesiastics seised *jure ecclesiæ*, or by tenants in tail, which are the only instances adduced by *Littleton*, § 593, 4, 5. A *discontinuance* strictly applies to those cases only, where [50] a person is dispossessed of an estate of *freehold*; and where, though he has lost his right of entry, he *can recover* the possession by action. *Co. Litt.* 325, a. n. 1.

5. The term *deforcement* is frequently applied to any withholding of real property from him who has a right. But, in its more restricted sense, it is confined to such cases of detention of the freehold from him who has the right, (but never had possession under that right,) as do not come within the definition of an abatement, intrusion, disseisin, or discontinuance. Such, for example, is the

withholding from a widow her dower, to which she is entitled. [3 *Bl. Com.* 173; *Co. Litt.* 277.]

With regard to all these injuries, we adopt the definitions, and most of the doctrines of the law of England; while in practice, the remedies to which we resort are more *simple, prompt, and efficacious*, than those which are in use in the English courts.

The consideration of these several injuries, with their appropriate methods of redress, which are supposed to present more difficulties to the student, than any other department of legal learning, will chiefly engage our attention in the following pages. And we believe we may venture to assure him, that he will find those [51] difficulties far less formidable, than he had been led to anticipate.

SECT. II. It is scarcely possible to examine, even with the slightest attention, the ancient law of *Real Actions*, their great variety and strictness of form, and the numerous technical subtilties with which they are encumbered, without recognizing at once the characteristics of a scholastick age. In the great favour which was shewn by the judges towards the most captious exceptions, the substantial claims of justice were forgotten, or disregarded. The delays and evasions which were permitted by the law, and encouraged, or at least connived at by the courts, were endless; so that the abuses practised in the administration of justice, became at last oppressive and intolerable.

Instead of attempting to reform these abuses by the interposition of the legislature, the correction of them was left to the courts of law. The limited powers of these tribunals compelled them to resort to fictions, by the aid of which a new remedy was devised. This remedy was eagerly adopted by the suitors; and the

ancient forms of proceeding, which had long been the reproach of the law, soon became obsolete: so that in the modern practice of the English courts, (with the occasional exception of a *writ of Right*,) questions of title to real property are now wholly decided by the fictitious action of *Ejectment*, for the recovery [52] of a term of years. It may therefore be useful to the student, if we take some notice of this remarkable change in the law, by which a mere *action of trespass*, to enable a lessee for years to recover damages, when turned out of possession, has been transformed into a remedy for the recovery of *possessory rights to real property*, and in England, has usurped the place of the ancient remedies by *writs of Entry*.

SECT. III. It will be recollected, that by the early feudal law, estates for years were unknown. And when the vassals at length obtained from their lords permission to possess certain lands for a limited time, such grants were not considered as a transfer of the *title to the land*, but merely as *contracts* between the lord and his vassal. If the latter was deprived of his term, his remedy for the recovery of it was by the ancient *writ of Covenant*. But as this writ could only be brought between the *original parties* to the grant; if the tenant was dispossessed by the feoffee of his grantor, and not by the grantor himself, he could only recover damages, and not the possession of the land. *Brac.* 1, 4, c. 36, p. 220. And it was not until the reign of Henry III. that a remedy was provided for a termor to recover possession of his land, and damages, by the writ of *Quare ejecit infra terminum*. 1 *Reeves' Hist.* 341. Afterwards, [53] in the beginning of the reign of Edward III. a new remedy was given to the lessee for years by the action of *Ejectione firmæ*. This new writ was in its nature a

writ of trespass, and might be brought in all cases, except only where the lessor had ejected his own lessee, and then made a feoffment to another person. In *this* case the second lessee, coming into possession by title, could not be considered a trespasser; and the remedy was by the writ of *Quare ejecit infra terminum*, before-mentioned. As neither of these actions suited all the exigences of lessees for years, they next applied to the *courts of equity* for redress, by compelling a specific performance of the contract by the *lessor*, or granting against *others* a perpetual injunction. *Gib. Eject.* 3. Soon afterwards the *courts of law* attempted, by an extraordinary proceeding, to render substantial justice to lessees for years. This was effected by a change of the proceedings in the action of *Ejectione firmæ*, and rendering a judgment that the lessee *recover his term*, and awarding a writ of possession; neither of which was prayed for by the declaration, or warranted by the form of the writ.

The precise time when this remarkable alteration took place, and the immediate causes which led to it, [54] are still involved in obscurity; but the effects were highly important. In consequence of the promptness and efficacy of this new remedy, real actions, on account of the infinite embarrassment and delay attending them, gradually fell into disuse; and the action of ejectment became the regular and usual mode of *trying possessory titles*.

SECT. IV. As an ejectment, even after the alteration of its judgment, could regularly only restore the possession to *termors*, who had been ejected from their lands; it is manifest that the right to the *freehold* could be but *indirectly* determined by it. And the injury complained of, being the loss of possession by the

termor, it was necessary not only to create a term for the express purpose of commencing the suit; but that its possessor should be ejected from the land. This was effected by the party who claimed title entering upon the land, and *delivering a lease for years* to any third person, who remained until some person came upon the land, *animo possidendi*, (or perhaps even by accident,) against whom the action of trespass and ejectment was brought. Upon the trial, the plaintiff could not obtain a verdict, without proving his lessor's title to the land; and thus the claimant's title was effectually tried *in the name of the lessee*. But to avoid the penalty of the old law of *maintenance*, an actual entry of the lessor was indispensable. And it is [55] from *the necessity of this entry*, that even at the present day, the remedy by ejectment is confined to cases in which the claimant has *a right of entry*.

It was soon found necessary for the court to prohibit the plaintiff's proceeding against *any third person*, as an ejector, without *giving notice* to the tenant in possession, who thereupon applied for leave to defend the action, in the name of the defendant; which he was always permitted to do, on undertaking to indemnify him. In consequence of this rule, it soon became the practice to have the lessee ejected by some person, (since called the *casual ejector*,) and to give notice in the *first instance*, instead of making him the trespasser. Still difficulties existed about the leases, and making entries, especially where the lands claimed were in possession of several persons. *Co. Litt.* 252, b; *Palm.* 402. But no remedy was provided until the time of the *Protectorate*, when Rolle C. J. devised a method of proceeding which superseded the ancient practice at once. This was done by dispensing with all the *real proceedings*

which have been mentioned, and introducing in their place a number of *fictions*, by which the defendant agrees to *admit on the trial*, the making of the *lease* to the plaintiff, that he *entered* under it, and has been [56] *ousted* by the defendant; and that he will at the trial only rely upon his title.

It is rather singular, (as Mr. *Butler* has observed,) that real actions should have gone so much out of use in the English courts; as many cases must have frequently occurred, in which a *writ of Ejectment* was not a sufficient remedy. *Co. Litt.* 239, a. n. 1. [As for example, where there has been a descent cast which has *toll'd the entry* of the disseisee; or where a man has been disseised, and has suffered twenty years to run, without making an entry upon the disseisor. In both these cases, having lost his right of entry, he could not maintain an *ejectment*; but unless thirty years had elapsed since he or his ancestor was seised, he might maintain a writ of *Entry*, as well as a writ of *right*; and in that way keep the latter remedy in reserve, to be resorted to, if by accident he should fail in his writ of entry.] In a few cases, *writs of Right* have been resorted to in *England*; but the demandants, who have always found many obstacles in their way, have not very often prevailed. 3 *Wils.* 419, 541, *Tissen vs. Clark*; 2 *Black.* 1266, *Luke vs. Harris*; 1 *H. Bl.* 1, *Dally vs. King*; 2 *B. & P.* 570, *Dowland vs. Slade*; 3 *B. & P.* 453, *Dumday vs. Hughes*; 2 *N. R.* 429, *Maidment vs. Jukes*; 5 *Taunt.* 326, *Jayne vs. Price*. With many enlightened men in *England*, it has been a subject of regret, that the *fictitious* proceedings in the action of ejectment should have so long remained unaltered; since no possible inconvenience could result from a change being made by the legislature, so that the *freehold* should be recovered in-

stead of a *term*. It is a sufficient reason for such a change, that no client can possibly be made to understand these fictions. Nothing surely is more absurd, than needlessly to involve in mystery, the proceedings by which justice is intended to be administered. *See Bar. on Stat.* 101, note o.

SECT. V. In the administration of this depart- [57] ment of the law in our own country, it will be found, that not only frequent alterations have been made; but that great diversity of practice still prevails, in the courts of the different states. In all of them, most of the great principles of the common law, respecting real property, are recognised, as far as is compatible with the rejection of the *feudal doctrines of tenure*. But the legal remedies, by which those principles have been applied to the vindication of private rights, and the redress of this class of injuries, have been almost infinitely varied, to accommodate them to local circumstances, and the different views of improvement or convenience, which have been entertained by the state legislatures.

To this great variety of legal remedies, even the national judiciary has been compelled, in some measure, to give its sanction, by the necessity of adopting the local practice to a considerable extent in the different circuits. For although that high tribunal has expounded its judicial power, of giving *remedies at law and in equity*, to be not according to the practice of the state courts, but according to the principles of *common law and equity*, as defined and distinguished in *England*, from whence our jurisprudence was derived: still it adopts the general principle of *public law*, that remedies in relation to real property, are to be pursued according [58] to the *lex rei sitæ*, the law of the place where the property is situated. 3 *Wheat.* 212, *Robinson vs. Campbell*.

It would not perhaps be of much use to those, for whose benefit this work is chiefly designed, (if it were practicable,) to point out the various remedies and modes of proceeding, which have been adopted in the several states. And with regard to some of them, it would require a more accurate knowledge of the established practice, than their reported decisions enable us to obtain. In most of the states, the practice has been very different at different periods of their history. Many of the changes which have taken place, have long been forgotten; and it would now be difficult, if not impossible, to recover and retrace them. Still, there are perhaps no subjects of historical research, which possess higher interest with the ingenuous and inquisitive student, than those which relate to the early judicial institutions and proceedings of our ancestors. On this occasion it will only be proper to refer to a few of the well known facts, respecting their character and history, which are connected with the progress and present state of our jurisprudence. Some further particu-

lars, drawn from the early records of our courts, [59] illustrating the history of the *Law and Practice of Real Actions*, from the infancy of our judicial institutions to their present state of maturity, will be found in another place. See note A, at the end of this volume.

SECT. VI. The crown of *England*, it is well known, claimed a great part of this country, by the right of discovery. And it is a principle asserted by that government, and sanctioned by judicial authority, that where a country is discovered and planted by *British subjects*, all the laws of the realm then in force are the birthright of such subjects; and the obligation of those laws continues, so far as they are applicable to the condition of an infant colony. 2 *P. W.* 75; 2 *Salk.* 411, 666; 1 *Bl.*

Com. 107. Accordingly, the founders of the *American Colonies* considered that they brought with them to these shores the principles of the *common law of England*, which they claimed as their inheritance, and acknowledged as the basis of their civil rights and obligations.

By the charter of *Massachusetts Bay*, granted by *Charles I.* in 1628, the colonists held their lands of the king, "as of his manor of *East Greenwich* in the county of *Kent*, in *free and common socage*, and not in *capite*, nor by *Knight's service*." Whether this clause was inserted at the request of the colonists does not appear. But the grant was probably intended to create that peculiar tenure, which prevailed in the county of [60] *Kent*, denominated *Gavelkind*, which is generally admitted to be a species of socage tenure. *Wright's Ten.* 211; 2 *Bl. Com.* 85. It does not seem probable that the rules of descent according to that tenure were ever established. "The insolent prerogative of primogeniture," as *Gibbon* calls it, was however disallowed, though some of the colonists were inclined to favour it.

The leading persons among them, perhaps with more piety than political wisdom, were desirous, on all occasions, of introducing the provisions of the *Jewish code* into their law. And those who were disposed to support, in some measure, the claims of primogeniture, drew from that source, as they thought, an unanswerable argument in its favour.

By their charter, they were authorized to make laws and ordinances "for the government of the said lands and plantation," "not repugnant or contrary to the laws and statutes of the realm of *England*." But they manifestly had no authority to change the *law of descent*. Yet an ordinance of 1641 directs the court of the jurisdiction where any deceased person had his last resi-

dence, to assign to the widow such part of his estate as they should judge just and reasonable, and also [61] to the children or other heirs their several proportions of the estate : *Provided*, that the eldest son should have a *double portion* ; and where there were no sons, the daughters should inherit as *coparceners* ; unless the court, *upon just cause alleged*, should otherwise determine. From the discretion thus vested in the courts, it would seem that the law of descents was not at that time settled with much precision. However that might have been, no further legislative provision was made, until after the receipt of the charter of *William and Mary* in 1692 ; and the law which gave a double portion to the eldest son was not repealed until 1789. *Stat. 1789, ch. 2.* The obligations of *feudal tenure* are no where recognised by their laws.

The first legal tribunals of the colony were formed upon a plan of almost patriarchal simplicity. The legislative and judicial functions were generally united in the same persons. *Mass. Col. Ordinances, 1632, 1644.* *The forms of judicial proceedings* were, for a considerable time, but little known or regarded. Plain and simple in their characters and manners, our ancestors made simplicity and plainness the most striking feature of their civil as well as religious institutions. Rejecting with disdain every thing that savoured of idle ceremony, in the administration of the law, or impeded their characteristic promptness of decision, they tolerated [62] no delays in judicial proceedings, which the claims of justice did not imperiously demand.

At length, lawyers who had been educated in *England* obtained some of the chief offices in the colonies, and gradually introduced the practice of the *English* courts, or incorporated some part of it with the local

usages of the country. This however was less the case in *Massachusetts*, than in some of the other colonies, where the courts were not only organized, and justice administered, upon the *British* plan, but the same circuitous system of conveyancing was also introduced, that still prevails in *England*.

It is certainly somewhat remarkable, that while not only the courts of New York, (where the *English* practice has been most strictly adhered to,) but those also of several of the other states, have adopted, either wholly, or with certain modifications, the course of trying questions of title to real *property*, by the *personal action of Ejectment*; *writs of Entry* and other *real actions*, (which had become nearly obsolete in the parent country, before the settlement of the colonies,) are the common remedies in our courts. Still we believe it must be admitted by those who are competent to decide, that *real actions*, stripped as they are in our practice, of the cumbrous appendages of *Essoins*, *Protections*, *Aid-prayers*, *Vouchers*, and *Parol demurrers*, (to be noticed hereafter,) which made them intolerable, [63] and finally caused them to be abandoned in their native country, are admirably adapted to the *advancement of justice*, and to the correct and effectual decision of *questions of title to real property*.

SECT. VII. The legal remedy for an injury to real property, amounting to an *ouster*, is either by *entry* of the owner upon the land, or by *action at law*. In most cases the law gives to the injured party both a right of entry and a right of action. But in some he has a right of action, though he cannot lawfully enter; in others he may enter, but cannot maintain an action until such an entry is made. *Co. Litt.* 249, a; [2 *Prest. Abst.* 355, 6.] It will be convenient, therefore, to point out, before we

proceed to the consideration of the several remedies, some of the principal cases to which these distinctions apply. In doing this we shall have occasion, not only to refer to several of the leading doctrines which were discussed in the introduction, but in some measure to apply them to the present subject. For since the remedy for the injuries which we are now considering, *consists in the restoration of the seisin* to him who has the right, and from whom the seisin has been wrongfully wrested or withheld; the first inquiry is, *when* and by *what means* he has been deprived of it. The nature of the wrong determines the nature of the [64] remedy by which that wrong is to be redressed.

SECT. VIII. *First*, it will be recollected, that the rightful owner in all cases of *abatement*, *intrusion*, and *disseisin*, may make a formal and peaceable entry upon the lands of which he has been ousted, and thereby acquire or revest the seisin in himself. Or he may pursue, in the first instance, the more effectual remedy of a suit at law. *Co. Litt.* 57, b; 3 *Bl. Com.* 175. The right of entry by the owner, may however be *toll*ed or lost in several different ways; and when this happens, his only remedy is by action.

[By the ancient law, according to *Bracton*, if the disseisor had been suffered to remain long in possession, the disseisee could not lawfully enter upon him. *Lib.* 4, *fol.* 162. Before the time of *Littleton*, however, the law upon this subject had been altered, and the disseisee might enter upon the disseisor at any time during his life. But upon the death of the disseisor, leaving issue, the lands descended upon the issue, and the entry of the disseisee was thereby *toll*ed. "Because," says *Littleton*, "the law casts the land upon the issue by force of the descent, so that the issue cometh to the land *by force of*

law, and not by his own act." § 385. And lord *Coke* remarks, that "one of the reasons of this ancient law may be, that the heir, by intendment of law, cannot suddenly know the true state of his title." *Co. Litt.* 237, b ; *Gilb. Ten.* 21, 23.]

But to the generality of this rule, the common law made an exception in favor of the claimant, who, during the life of such wrong-doer, was under the disability, either of *infancy*, *coverture*, *insanity*, *imprisonment*, or *absence* from the country. The same exceptions are made likewise by our statute of limitations. [65] *Mass. Stat.* 1786, ch. 13, § 4. The indulgence of the law in none of these cases, considers the omission to enter, as the *laches* or fault of the party: and he may enter upon the heir to whom the lands have descended, as he might have done upon the ancestor, who committed the wrong. *Litt.* § 402 ; *Co. Litt.* 246, a ; 1 *Co.* 140. Another exception was made by the stat. 32 *H. VIII.* ch. 33, (which, though not re-enacted, seems to be adopted as a part of our common law,) by which it is declared, "that where one person disseises or turns another out of possession, no descent to the heir of the disseisor shall take away the entry of him who has *the right* to the land, unless the disseisor has held peaceable possession *five years after the disseisin*, without either entry or claim." [See 2 *Pick. R.* 489, *Emerson vs. Thompson.*]

This provision of the statute is said to be restricted, according to the terms of it, to a *disseisor only*; and that it shall not be so expounded as to include either an *abator* or an *intruder*, nor the *feoffee* or *donee*, immediate or mediate, of even the *disseisor himself*. [Therefore, if after an abatement or intrusion, a descent is cast upon the heir of the wrong-doer, the rule of the common law

prevails; and a seisin by such person for any time before the descent, however short, will take away the entry of the rightful owner, and compel him to seek his remedy by action. *Co. Litt.* 238, a. So likewise, if the abator, intruder or disseisor should alien the land, and the alienee should die seised, the descent to the heir of the alienee would immediately bar the entry of him who had the right, though the alienee had not held the possession for five years. And if, after a descent to the heir of the disseisor, such heir should die seised, a second descent to the heir of such heir would *toll* the entry *immediately*; unless such last mentioned heir was party to the disseisin; for in that case the law would not protect him in his wrong. 2 *Prest. Abst.* 413.]

The reason assigned for this strict construction is, that the statute, to some purposes, is penal. *Co. Litt.* 238, a; 256, a; *Plowd.* 47. But though only the disseisee and his *heir* are mentioned, yet it is held that

the *successor* is entitled to enter, where his pre-[66] decessor has been disseised, and a descent cast, within five years, in the same manner as the heir, upon the disseisin of his ancestor. *Plowd.* 47; *Litt.* § 413; *Co. Litt.* 238, a; 240, a.

[A descent which takes away the entry of the disseisee, must be where the disseisor dies seised in his demesne as of fee, or in fee tail. For a dying seised of an estate in the land for the life of the disseisor, or of any other person, will not take away the right of entry. *Litt.* § 387. Neither will the descent of a reversion to the issue of the disseisor have that effect. *Ib.* § 388. "Therefore," says lord *Coke*, "if a disseisor make a lease to one and his heirs, during the life of I. S., and the lessee dieth, living I. S., this shall not take away the entry of the disseisee, because the dying

seised was of a freehold only." *Co. Litt.* 239, a. And if a disseisor make a lease for life, and die seised of the reversion, this descent shall not take away the entry of the disseisee ; for although he had the fee at the time of his death, he had not the *freehold*. But if the lease had been for years only, the descent would have taken away the entry, because the disseisor would in that case have died seised of the fee *and the freehold also*. *Co. Litt.* 239, b.

But a descent does not take away the entry of a lessee for years, (or, in *England*, of a tenant by statute merchant, statute staple, or by *elegit* ;) since these tenants have not the *freehold*, but only a chattel interest. The reason is manifest ; by their entry they could not *take the freehold* from the heir of the disseisor, who is in by descent ; since they claim not the freehold, but only a chattel interest, or term of years. It is accordingly laid down by lord *Coke* "that as a descent of the freehold and inheritance shall take away the entry of him that *right hath to the freehold, or inheritance* ; so a descent of a freehold and inheritance *cannot* take away the entry of him that hath but a *chattel* ; for there can be no *descent or dying seised* of a chattel." *Co. Litt.* 249, a.]

It is here important to call the attention of the student to a distinction which should be kept in mind, between a *right* for which the law gives a remedy by *action*, as well as by *entry* ; and a *title*, as lord *Coke* calls it, for which the law gives *no remedy by action*, but *only by entry*. In the first case, where there is a remedy by action or entry, the right of entry *may be tolled by a descent*. But in the other case, where the party has only a *condition*, and a right by entry, *and in no other way*, to take advantage of the breach of the condition, no descent can take away this right of entry ;

for if it could, his right *would thereby be barred forever*. *Co. Litt.* 200, b. [For the same reason, he who claims as *devisee* is not precluded from his entry by a descent cast; because, to prohibit his *entry* would be to deny him *all remedy*. If, therefore, one seised in fee make his will and devise the estate, and die seised, and either the heir of the devisor, or a stranger, enter by abatement and die seised, this descent to the heir of the abator will not take away the entry of the devisee, or of his heir; for since the *devisee* in such a case could not maintain any *real action*, justice requires that the law should preserve his right or title of entry. But if the devisee had once *entered*, and obtained the seisin, so that he could maintain a real action, it would have been otherwise. *Co. Litt.* 111, a; 240, b; and see 2 *Sch. & Lefr.* 104.]

It is manifest that the disseisin intended by the statute of H. VIII. is an actual disseisin by the *tortious expulsion* of the true owner. This is indeed the primitive and genuine meaning of the term, and in this sense it is always to be understood, when applied to a *descent cast*. A mere entry upon another, is no disseisin, unless it is accompanied by an expulsion, or ouster from the freehold. *Disseisin* is the acquiring of an estate by [67] *wrong and injury*; and therein it differs from *dispossession*, which may be either rightful or wrongful. This is the uniform doctrine of the best authorities. See *Litt.* § 279; *Co. Litt.* 18, b; 153, b; 181, a; *Cro. Jac.* 685; 1 *Burr.* 109, *Atkyns vs. Horde*; [2 *Prest. Abst.* 295.] Therefore where a party relies upon *title acquired by disseisin*, and a descent from the disseisor to himself, or to one under whom he claims, he is bound to shew that the seisin of him, from whom the descent is

claimed, was *tortious*. 6 *Johns.* 217, *Smith vs. Burtis*; [1 *Greenl.* 120, *Tinkham vs. Arnold.*]

The owner's right of entry may also be lost or barred by our statute of limitations, (1786, ch. 13, § 4.) which, in conformity to the English statute, (21 *Jac.* l. ch. 16.) provides that no person, unless by judgment of law, shall make any entry into any lands, tenements, or hereditaments, but *within twenty years* next after his right or title first descended or accrued to the same. It also contains, in all the cases of disability before mentioned, a saving of the further term of *ten years* from the time such disability shall cease or be removed.

It has been before remarked, that by the English statute 4 & 5 *Ann.* ch. 16, even such an entry within twenty years would not avail the party, unless he should commence his action within one year after such entry, and prosecute the same with effect. But [68] this provision has not been inserted in our statute of limitations, or adopted in the practice of our courts. Still, however, it seems, as was before intimated, that an entry, which shall be available to avoid the statute of limitations, must be a formal entry for the *express purpose* of taking possession, and not a mere casual going upon the land. 4 *Johns.* 390, *Jackson vs. Schoonmaker.* *Introd.* § 11.

SECT. IX. *Second.* With regard to a *discontinuance*, (if any case of it now exists in our law,) it will be recollected, that, according to its definition, it consists in the inability of the owner to restore his right *by entry*, and his being compelled to resort to an action to enforce it. The injury in the case of a *discontinuance*, and also of a *deforcement*, which we are next to consider, does not arise from a *wrongful entry* upon the estate, (as in the cases of abatement, intrusion, and disseisin, just

mentioned;) but the wrong consists in detaining or withholding the possession, *after the right of the tenant has ceased or been determined.*

The three cases of discontinuance adduced by *Littleton*, (§ 593, 594, 595,) are the following, viz. 1. The alienation of the husband, who was seised in right [69] of his wife, was, at the common law, a discontinuance of the wife's estate. 2. The alienation of ecclesiastics seised *jure ecclesie*, as a bishop, or dean, without the consent of the chapter, was also a discontinuance. 3. Alienations by tenants in tail in certain cases. As if tenant in tail made a feoffment in *fee simple*, or for the *life of the feoffee*, or a *gift in tail*. In all these cases, though he exceeded the limits of his legal authority, which extended only to the granting of a lease *for his own life*; still, as the entry of the feoffee was lawful, he might rightfully continue to hold, during the life of the tenant in tail, who made the feoffment or gift. But if he retained the possession *after the death of the feoffor or donor*, it was a discontinuance of the estate tail. Neither the heir in tail, nor the remainder-man or reversioner, who were entitled *after the determination of the estate tail*, could now recover their rights *by entry*, but were compelled to resort to their action. *Co. Litt.* 326, b.

The *first* of these cases of discontinuance was long since taken away in *England* by the statute 32 *H. VIII.* ch. 22; and the *second* by statutes, 1 *Eliz.* ch. 15, and 13 *Eliz.* ch. 10, which declare such conveyances void *ab initio*. And as to the *last*, it may be observed, that our own statute of 1791, ch. 61, by authorizing tenants in tail to convey in *fee simple*, and thereby bar, not only the claims of the issue, but the rights also of the remainder-man and reversioner, has *put an end*

in our law, to discontinuances by tenant in tail. It seems, therefore, that not only in *Massachusetts*, but in every part of our country, where estates tail have been either abolished, or tenants in tail are authorized to convey an estate in fee simple, *no case of a discontinuance of the freehold*, in the strict import of that phrase, can any longer exist.

[It may indeed be thought, that a conveyance *with warranty*, by which the heir is estopped from claiming lands to which he would have been entitled, but for such warranty, constitutes an exception to the foregoing remark. And it is true, that not only a feoffment, but a bargain and sale, a covenant to stand seised, or even a release, with a *general warranty* annexed, have been said to produce a discontinuance, if the warranty descends upon the same person, who would otherwise have been entitled to the lands so conveyed. *Co. Litt.* 239, a; *Gilb. Ten.* 120; 1 *Pick. R.* 328, *Stevens & ux. vs. Winship & ux.* It may be proper to remark, however, that the effect of these conveyances, is to defeat the title of the heir, on whom the warranty descends, and not merely to take away his right of entry, and to drive him to an action, as his only remedy, which is the appropriate operation of a discontinuance. *Finch*, 190.]

It may not be amiss to call the attention of the student to an important difference between the situation or title of him, who claims to hold by conveyance from one whose alienation formerly *created a discontinuance*, and him who claims as heir or alienee of a *disseisor*. For since the heir and alienee of a disseisor claim under a person who came into the estate by a *wrongful title*, their estates are *immediately defeasible*. But in the other case, the alienee claims under a person who had a *lawful estate*: and though he has undertaken to convey

a larger estate than the law allows ; yet if his conveyance does not create a forfeiture, the estate of his grantee is *unimpeachable* during the life of the grantor. *Co. Litt.* 325, a. n. 1.

SECT. X. *Third.* Generally upon a *deforcement*, according to the ancient doctrine, the owner of the [71] estate could not enter, but was driven to his action.

For since in most cases of this kind, as well as in those of a discontinuance, the original entry of the tenant was lawful, and an *apparent right of possession* was thereby acquired, the law would not suffer that right to be defeated by *the mere act* of the lawful claimant, in entering upon the land. 3 *Bl. Com.* 175. Thus if a man marries, and during the coverture is seised of lands, which he aliens, and then dies, or is disseised and dies, or even if he dies in possession ; and the *alienee, disseisor, or heir*, enters upon the lands, and *refuses* to assign dower to the widow, this is a *deforcement*. For this injury or denial of right, she has no remedy by entry, but is driven to her writ of dower. *Co. Litt.* 37, a ; 1 *Cruise*, 159 ; *F. N. B.* 147 ; *Mass. Stat.* 1783, ch. 40. In this case she has no means of redress by an Ejectment, even in *England* : for that action can be maintained, only where the plaintiff may lawfully enter. 2 *Show.* 184, *Chapman vs. Sharp*.

By the common law, if lands were leased for years, or during the life of some third person, and the lessee held over after the term was determined, either by lapse of time, or by surrender, or the death of *ces-* [72] *tui que vie*, this was a *deforcement* ; and the reversioner or remainder-man could not restore his right by entry. 1 *Finch, L.* 137 ; [41, b ;] *F. N. B.* 201. But by the law of this state, if tenant *pur auter vie* continues in possession after the determination of his estate,

he is considered a tenant at sufferance only ; and he who has the remainder may lawfully enter upon such tenant, and even *upon his heir*. 9 *Mass. R.* 377, *Martin vs. Woods*.

It is a general rule of law, that though a deviser die seised, his devisee is not therefore seised, until he makes an entry, or some other act is done, which in law is considered as having the effect of an entry. The same rule applies to a remainder-man, because he, like the devisee, comes into the estate as a purchaser. But if the possession be vacant, an entry is not necessary ; because an entry can be of no avail, where there is no person in possession upon whom to enter. So also if a stranger is in possession, acknowledging the title of the devisee, or of him who has the remainder, it will be held equivalent to an entry. 4 *Mass. R.* 67, *Wells vs. Prince*.

[It is a general principle, that the possession of the termor is the possession of the owner of the reversion or remainder, so as to give them an *actual seisin*, as distinguished from a seisin in law. *Co. Litt.* 15, a ; 2 *Prest. Abst.* 441. So the possession of a guardian in socage, or by nurture, or of a tenant at will, (but it seems not a tenant by sufferance,) will give an actual seisin, so as to make the stock of a new succession to the inheritance. *Co. Litt.* 15, a, and *Hale's note* ; 3 *Wils.* 516, *Newman vs. Newman*.]

SECT. XI. *Fourth.* According to the doctrine of lord *Mansfield*, in *Taylor vs. Horde*, (1 *Burr.* 112,) the *only case* in which the true owner may enter, though he cannot maintain an action, by the modern law and practice of *England*, is the entry to bar a fine with [73] proclamations. The same doctrine is also held by the courts in *New York*. 1 *Johns. Cas.* 125, *Jackson vs. Cryslar*. The general principle before referred to, (*In-*

trod. § 19,) is that when the entry is required, only to complete the claimants' title, as when a power of re-entry is reserved for the breach of any condition in a lease or grant, the common *consent rule*, as it is called, by which the defendant agrees to confess the lease, *entry* and *ouster*, will enable the plaintiff to maintain his ejectment, *without any actual entry upon the land*, for the recovery of which the action is brought. But when the entry is required to *rebut the defendant's title*, as in the case before mentioned of an entry to bar a fine, the confession of an entry will not avail. There must be an *actual entry* upon the land before an action can be supported. *Doug.* 477, *Goodright ex d. Hare vs. Cator*. In every other instance, (where the fictitious action of ejectment is adopted in practice,) the formal confession of the lease, entry and ouster has been held sufficient, *without the ceremony of an actual entry*.

But in the practice of *Massachusetts*, (where the usual remedy for the recovery of real property is a *writ of Entry*,) and indeed in the practice of all those courts in our country, where the defendant in ejectment [74] does not confess, upon the record, the supposed lease, entry, and ouster, the law is different, *in consequence of the different form of the remedy*. Thus, *upon the breach of a condition* in a conveyance of real property, the feoffor, grantor, or his heirs, become entitled to the estate to which such condition is annexed. But no action can be brought for such a breach before entry. The *only mode* in which advantage can be taken of it, (at least in the case of a freehold estate in lands,) is *by an entry upon the land*; after which he may resort to his action if necessary. 5 *Mass. R.* 324, *L. & K. Bank vs. Drummond*; 2 *Cruise*, 49; [8 *Pick. R.* 284, *Gray vs. Blanchard*.] But when the party who is en-

titled to take advantage of the breach of such condition, is *already in possession*, and therefore cannot enter, the estate will revert in him immediately, upon breach of the condition. *Ibid* ; *Co. Litt.* 218, b. It should be observed, that in this case an entry by a stranger, on behalf of the person entitled to enter, has been held sufficient without any preceding authority ; if it be afterward assented to or ratified by such party. 2 *Stra.* 1128, *Fitchet vs. Adams* ; [3 *Pick. R.* 245, 6.]

SECT. XII. It has been mentioned that *one of the remedies*, provided by the law, for injuries to real property amounting to an *ouster*, was by the open and peaceable *entry* of the rightful owner. It is not, [75] however, to be understood, that the entry of the owner, is an *adequate and effectual remedy* in all cases of *ouster*, where the right of entry is not lost. If upon the entry of the lawful proprietor, whose entry is not taken away, the party, who has acquired the seisin by wrong, chooses voluntarily to relinquish it, and *to yield to the title of the rightful owner*, his seisin will be revested by such entry, and the remedy is complete. This conciliatory disposition, however, is not often manifested on such occasions. If then, (as is generally the case,) the wrong-doer, notwithstanding the entry of the rightful proprietor, still pertinaciously retains the possession against him, or resists his entry, *such resistance is an ouster and disseisin*, upon which an action may be maintained. And if the party so entering has a good title to the land, as well as a right of entry, the party, who thus holds him out, *cannot qualify his own wrong*, by claiming to hold only as tenant for years or at will to some other person. [*Co. Litt.* 271, a ;] 12 *Mass. R.* 325, *Proprietors, &c. vs. McFarland*. The effect of such an entry is only to acquire a *momentary seisin* by the rightful

owner; and he is still driven to his action at law for an effectual remedy.

SECT. XIII. In one point of view, however, it is [76] material to consider the effect of this *seisin for a moment*, thus acquired by the entry of the rightful owner upon the party who committed the *ouster*. If the party by whom the entry is made was *actually seised*, before the *ouster* committed by him on whom he entered, the momentary seisin acquired by such re-entry is wholly inoperative. But on the other hand, if he has *never before been seised* of the estate, but now first makes his entry, (either as heir, devisee, remainder-man, or reversioner, or for breach of a condition,) the effect of such entry *may be highly important*. For though the seisin thereby acquired is but a seisin for an instant; yet, the act of the tenant in opposing his entry, or withholding the possession from him, amounts to a disseisin. 12 *Mass. R.* 325, *Proprietors, &c. vs. McFarland*. And this gives the party who thus enters, the right, if he elects to avail himself of it, *to change the form* of his remedy by action.

[It may be useful here to remind the student of the difference which the law makes in favor of the right, between a *lawful* entry and one that is *unlawful*. For though a stranger cannot gain an actual seisin against the owner, without ousting him or his tenant, unless it be by entering on lands that are unoccupied; yet in favor of the right, the lawful owner, by an actual entry, may restore his seisin, without turning the person who is wrongfully in the actual seisin out of possession. Thus, if I have been disseised, but have still a *right of entry*, and enter on the land, the seisin vests immediately in me; and if I am again ousted, or denied the occupation by the person in possession, this will be a re-disseisin. *Litt.* § 411, 430. But the seisin which was

obtained by this entry will still be important for many purposes. It will be a sufficient seisin to maintain a writ of Right or a writ of Entry; and also to preserve the right of entry for a new period of twenty years, and against those descents which might otherwise have *toll*ed the entry. *Litt.* § 429; 2 *Prest. Abst.* 292.]

To make this subject more intelligible, it may be useful to mention here, what there will be occasion to state more fully hereafter; that in every *writ of Entry*, it is necessary to allege with precision the nature of the injury complained of; that is, whether the party against whom the action is brought, entered, and committed the wrong, as an *abator*, *intruder*, or *disseisor*. If the complaint is against the tenant as an *abator*, the [77] count must state whether the demandant is heir or devisee; if an *intruder*, whether the claim is by the remainder-man or reversioner; and if the complaint charges the tenant as a *disseisor*, it must set forth whether the disseisin was done to the *demandant*, or to his *ancestor*. But if the demandant can *lawfully enter* in any of these cases upon the abator or intruder, or upon the disseisor of his ancestor, he thereby vests the seisin in *himself*. The effect of such entry is to *put an end to the first ouster*; and if the wrong-doer still retains the possession after the entry, it is a *new disseisin* of the party so entering. And the remedy may now be changed from a writ of Entry against the abator, or intruder, or the disseisor of the *ancestor*, to a writ upon a *disseisin done to the demandant himself*. This change of the remedy, it is however to be understood, is always *at the election of the demandant*, who may at pleasure *waive the effect of his entry*, and pursue his remedy in the same manner as if he had *not* entered. *Booth*, 84; and see *Litt.* § 478; *Co. Litt.* 278, b.

SECT. XIV. But the remarks which have just been made must be understood as applying only to the remedy by *writ of Entry*, according to the present practice of the courts in *Massachusetts*, and some of the [78] adjoining states. Or rather they are not to be understood, as applicable to proceedings, where the remedy for the recovery of real property is by the modern *action of Ejectment*, according to the present practice in *England*, and in the state of *New York*. This form of proceeding, as has already been stated, (*ante*, § 2,) supposes a wrong to the lessor of the plaintiff, not indeed by an act done to himself, but by the expulsion of his supposed lessee, by a stranger, against whom the action is brought; and notice of the action is given to the tenant, who is in possession of the land. The tenant is permitted to defend the suit, only upon consenting to a condition required by the court, that he will confess *lease, entry, and ouster*: that is, he must admit a *lease* to have been made, by the party who claims title, to the supposed or nominal plaintiff, who has *entered* under that lease, and been afterwards *ousted* by the supposed defendant. The tenant must also agree, that in the trial of the issue, he will insist only on his title. *Ad. on Eject.* 233; 3 *Bl. Com.* 202.

It is manifest, therefore, that if the lessor of the plaintiff had a lawful right to enter upon the land in dispute, at the time he commenced his ejectment, he might of course make a valid lease of it. Consequently, [79] this *confession of an entry*, for all the purposes of trying the question of title between the parties, has precisely the same effect as an *actual entry*. *Doug.* 485, *Goodright vs. Cator*; 1 *Johns. Cases*, 125, *Jackson vs. Chrysler*. But if the right of entry was taken away, before the action of ejectment was commenced, either

by the statute of limitations, or any other means, so that the lessor of the plaintiff could not lawfully have entered, the confession of an entry would be of no avail. For since an *actual entry* in such a case would have been a *trespass* against the tenant; the confession of an entry would only amount to an admission by the tenant, that the lessor of the plaintiff was a trespasser. 1 *Burr.* 119, *Taylor vs. Horde*. And as no person by the ancient law was permitted to make a lease for years, any more than a conveyance of a freehold, *unless he was in possession* of the property leased; hence the reason that an action of ejectment cannot be maintained, even by one who *has the right of property*, unless he has also a *right of entry*. And hence also it follows, that wherever an action of ejectment can be maintained, *the form is always the same*, whatever may be the nature of the *ouster*, whether an *abatement*, an *intrusion*, or a *disseisin*: and if a disseisin, whether done to the *party who sues*, or his *ancestor*. In this respect, the [80] remedy, by *ejectment* is totally different, from the more ancient course by writs of Entry, which, as we have seen, were *minutely varied*, so as to adapt them in every case, to the *particular nature* of the *title*, and also of the *injury*.

SECT. XV. Before we proceed to the consideration of the several classes of Real Actions, adopted in our practice, it may be useful to notice a distinction between real and personal actions, in regard to the effect of a *former judgment*, in barring or binding the parties, when a subsequent action is brought for the same cause. In personal actions, as debt, covenant, assumpsit, trover, trespass, and the like, a judgment against the plaintiff upon *demurrer*, *confession*, or *verdict*, is generally a perpetual bar. Those cases only form an exception, in

which the remedy has been misconceived ; as where *trespass* has been brought by mistake instead of *trover* ; or where the plaintiff has misstated his cause of action, and the defendant demurs, and has judgment in his favor. 2 *Saund.* 47, *l. note*. In these cases, if a second action is brought, in which the former misstatement is corrected, and the former judgment is pleaded in bar, the plaintiff may reply that the former judgment for the defendant was not obtained upon the *merits*. 1 *Chit. Plead.* 195.

[81] But even where the cause of action is misstated, if the defendant pleads, and the plaintiff takes issue, and has a *verdict* against him in a personal action, he is *estopped* to bring a fresh suit. In such a case, to prevent the effect of the judgment, in barring a future action, the only resource of the plaintiff, is to obtain leave to *discontinue or become nonsuit*. This the courts usually grant, upon payment of costs to the defendant, *even after verdict*, if the plaintiff appears to have a meritorious cause of action.

SECT. XVI. In *real actions* the law is otherwise. Remedies of this kind are not, like personal actions, all of the same order. They are of different natures or *grades*, rising one above another. And if a demandant be barred in a real action, by judgment upon a verdict, confession, or demurrer, he may still have an action of a *higher nature*, and try the same right again. The reason assigned for this indulgence is, because it concerns his freehold and inheritance. 6 *Co.* 7, b, *Ferrer's case*. A demandant, who was barred in an Assize of *novel disseisin*, might maintain an Assize of *mort d'ancestor*, or Entry *sur disseisin* of his ancestor. So if he was barred in any writ of Entry of his own seisin, or the seisin of his ancestor, he might maintain his writ of Right for

the same property. And the reason why a judgment in the first action against the demandant, cannot be pleaded in bar of the second is, that the last is of a higher rank or grade than the first. It is even held, that a judgment against the demandant in a *Formedon in the descender* is no bar to a *Formedon in the reverter*, or *remainder*; because both the latter are of a higher nature than the former; since an estate tail only is recoverable by a *Formedon in the descender*, and by the others the fee simple. 6 Co. 7, b, *Ferrar's case*.

Whether all these distinctions would be adopted by our courts, may perhaps be questionable. No occasion has probably occurred to call forth a decision upon some of them. But it has always been settled in our practice, that a judgment against the demandant in *any writ of Entry*, is no bar to his maintaining a *writ of Right*. This suggests a caution to the practitioner, not to resort to a writ of Right, where a writ of Entry may be brought; so that, if through accident, or any unforeseen occurrence, he should fail in the first suit, he may still have a remedy in reserve. [2 *Prest. Abst.* 347.]

SECT. XVII. The preceding remarks, it will be recollected, do not apply to the modern remedy by trespass and ejectment, as practised in England, and in some parts of our own country. No judgment in that action can bar either plaintiff or defendant [83] from suing again, and thus protracting litigation, to the impoverishment of the parties, if not to the reproach of the law. Whether the party has *failed* through some unforeseen accident; or from a restless spirit of litigation, he is inclined after one failure, to try the experiment of a second suit, it is always in his power to do so. For as the judgment in ejectment confers no *title to the freehold* upon the party in whose favor it

is given, it consequently is not evidence of title in a subsequent action, even between the same parties. *Bul. N. P.* 106; 1 *Mod.* 10, *Clerk vs. Rowell & Phillips*. It is manifest, therefore, that the judgment can never be final; and that it is always in the power of the party who fails in the suit, whether plaintiff or defendant, to bring a new action. For since a different demise may be stated in every new action, it never can appear *judicially* to the court, that the second ejectment is brought for the same cause of action as the first.

Application, it seems, has sometimes been made to the court of Chancery, by the party prevailing, after several ejectments determined in his favor, for a perpetual *injunction*. This has generally been refused by that court. But in one case, after such a refusal by the court of Chancery, upon appeal to the House of Lords, the *injunction* was granted. 1 *Bro. P. C.* 270, *Earl of Bath vs. Sherwin*.

CHAPTER II.

The Nature of Real Actions and their Incidents.

SECT. I. *Real Actions* are the remedies provided by the ancient law, for him who had right [84] or title to lands or tenements, the possession of which was unjustly withheld or wrested from him. By these actions the rightful owner, (here called the demandant,) might recover his possession, *according to the nature and circumstances of the injury he had sustained*. And the several remedies which the law has provided, *derive their names*, either from the principal point stated in the writ, or the nature of the wrong to be redressed.

Real actions are divided into *Actions possessory*, and *Actions droitual*. The first class is again subdivided into *possessory actions* upon the demandant's own seisin, and *possessory ancestrel*, upon the seisin of some ancestor. *Droitural actions* are where the party can no longer recover by *writ of Entry*; or where, for some other reason, he does not claim upon the *possessory title*, but *the right*; and the remedy in this case is by *writ of Right*.

These several remedies rise one above another, [85] as has been already observed, according to *the nature of the wrong* which has been inflicted, or *the right* to be restored. Thus if A. is disseised by B., while the possession continues in B., it is a mere *naked possession*, unsupported by any right. A. may, there-

fore, as we have seen, by *entry* on the lands, without any action, *restore his possession*, and put an end to the possession of B. But if B. dies, the *possession descends* by act of law *upon his heirs*. In this case, as the heirs come in by lawful title, they acquire, in the view of the law, an *apparent right of possession*. This title is so far good against the person disseised, (at least if the disseisor had possession for five years before his death, without entry or claim by the disseisee,) that he has now lost his right to recover the possession *by entry*, and can recover it *only by an action at law*. For this purpose, the possessory actions above mentioned are resorted to, and the writs by which they are instituted are called *writs of Entry*. But if A. permits the possession to be withheld from him beyond the period limited by the law, (which with us is thirty years,) or if judgment is recovered against him in a possessory action, either *upon a default or a trial of the merits*; in these cases B.'s title is strengthened in the eye of the law, and A.

[86] can no longer recover by a *possessory action*, but is compelled to resort to his *writ of Right*. This is his *last resort*: so that if he fail to commence his writ of Right within the time limited, (with us forty years upon the seisin of the ancestor, or thirty years upon his own seisin,) he is now without remedy, and consequently the title *acquired against him by wrong*, becomes *complete and indefeasible*. See *Co. Litt.* 239, a. n. 1.

As the party injured has in many cases an election of remedies, he should of course always choose the writ which is of the lowest nature. [*Booth* 1.] For although judgment against the demandant in a real action is a bar to another of the same, or an inferior grade, it is no bar, as was before remarked, to one of a *higher nature*.

If the demandant has brought a writ of *Entry*, and has been *cast*, either in consequence of some unexpected objection, or accidental occurrence, or upon a *full trial* of the merits, though it is a bar to suing a new writ of *Entry*, it is no bar to a writ of *Right*. And the reason is, that the tenant's having a better subsisting title, (which is all that a recovery in a writ of *Entry* is evidence of,) is no defence in a writ of *Right*. That writ draws in question, not the *title only*; but the *mere rights also* of the parties to the suit. 8 *Cran.* 229, *Green vs. Liler*. The demandant therefore should [87] not resort to his writ of *Right*, while he has a remedy by writ of *Entry*. [2 *Prest. Abst.* 347.]

SECT. II. Real actions by the ancient law, as well as by our own, were always local, and therefore must be brought in the county, where the land demanded lies. *Bract.* lib. iv. c. 20, fol. 189, 414. If the demandant's writ is sued in a wrong county, and this is *apparent upon the face* of the writ, the court will quash it on motion. But when not apparent, it must be pleaded in abatement. 7 *Mass. R.* 461, *Hawkes & al. vs. Inhabitants of Kennebeck*; 10 *Mass. R.* 176, *Gage vs. Ganet & al.*; [1 *Greenl.* 238, *Hathorne vs. Holmes.*]

Formerly, if the land was in several adjoining counties, an *Assize* must have been brought in *confinio comitatus*, and should so be stated in the writ. 35 *H. VI.* 30; [*Booth*, 2.] But that seems not to have been the practice in real actions generally.

It is also necessary to allege in the writ *where* the land lies, for the recovery of which the action is brought. [*Booth*, 3.] And here a distinction was once made between writs of *Entry* and writs of *Right*, on the one hand, and *Assize* or *Dower* on the other. The former were required to state the town, vill, or place, (not a

hamlet,) where the lands sued for were situated. [88] In the latter it might be described as being in a hamlet. 8 *Edw.* IV. 36; 17 *Edw.* III. 56. This distinction, however, has long since ceased even in *England*.

In our practice, if the land sued for is within the limits of any town, district, or other incorporated place, it should be so stated; if the place is unincorporated, any name or description by which the place is generally known, will be sufficient.

Formerly it was held necessary to observe a particular arrangement of the things demanded in a real action. *The more worthy* were to be placed before the *less worthy*, and an *entirety* before a *moiety* or other part. [*Booth*, 2.] Land with a dwelling-house was to be demanded before land without a building; and a castle before another messuage, or even a manor. 1 *Edw.* III. 4; 7 *H.* VI. 39. There is a manifest propriety in observing this order of arrangement; but a departure from it would not, as it once did, hazard the abatement of the writ.

Another nicety of ancient times, for which the writ was abateable, was denominated *bis petitum*. [*Booth*, 2.] It was where the same thing was *twice* demanded in the writ. Thus if the writ demanded a manor, and also a rent, or an advowson which was parcel of the same manor, it abated the writ. 3 *Edw.* III. 85; 6 *Edw.* III. 267.

[89] As the *freehold* is demanded in all real actions, it follows of course that the tenant, against whom the suit is brought, must be *seised of a freehold*, or he may defeat the demandant by pleading *non tenure*, as it is called. See *chap.* iv. § 16; [*Booth*, 3.] And if the tenant, against whom a writ of Dower or other real ac-

tion is brought, is not in the *actual possession and occupancy* of the lands demanded, it is required by our law that the person in possession should be served with a copy of the writ, or original summons, or by having it read to him by the officer, or the writ shall abate. *Mass. Stat.* 1797, ch. 50, § 4. This exception, however, must be taken by *plea in abatement*, and cannot be made by way of *motion* or *suggestion*, to the court.

SECT. III. The original writ, which was sued out of Chancery, in Real actions, was generally a *Præcipe quod reddat*. Its form was a direction to the sheriff to *command the tenant*, that he render the lands in question to the demandant: and unless he should do so, the sheriff was commanded to summon him by good summoners to appear, and shew wherefore he had not done it. The first process, therefore, was a summons, which was served by the sheriff or his bailiff, either upon the person of the tenant, or upon the land demanded. [*Booth*, 4.] And after summons, proclamation thereof was to be made on sunday, at the most usual door of [90] the church, after divine service. *Stat.* 31 *Eliz.*

ch. 3, § 2. There were to be fifteen days at least, between the summons and the day the tenant was to appear. 2 *Saund.* 45, n. 4. If he neglected to appear, his default was entered, and a judicial writ, denominated *grand cape*, was awarded against him. At the return of this second process, if the tenant did not appear, and save his default, either by alleging that he was not summoned, or shewing some other lawful excuse for his non-appearance, the demandant, according to the *strict rule of law*, was entitled to judgment for seisin of the land. *Booth*, 6. The excuses which were admitted to save the tenant's default, were *imprisonment*, *inundation of waters*, *tempest*, or *destruction of a bridge*, and some

others. But it was no excuse for a default, to allege generally that he was sick; though it was admitted as one of the usual *essoins*. *Plowd.* 18, 19; *Bendl.* 24. Upon default, after summons, an attachment issued, by which the sheriff was commanded to put the tenant by gage and safe pledges, *per vadium et salvos plegios*, so that he should be before the justices, to answer the demandant. This process, like the former, had fifteen days between the *teste* and return, and authorized [91] the sheriff to take security by personal goods only.

But the attachment soon degenerated to mere matter of form, and the pledges became only nominal persons.

If after attachment the tenant still neglected to appear, another writ was issued, called a *distringas* or *distrress infinite*. [*Booth*, 11.] By this the sheriff was commanded to distrain the tenant from time to time, *continually*, by taking his goods, and the profits of his lands, which were called *issues*. These by the old law were forfeited to the king, if the tenant did not appear. *3 Bl. Com.* 280. But by a late statute, (10 *Geo.* 3, ch. 50,) the court were authorized to cause the issues to be sold, to defray the reasonable costs of prosecuting the suit.

Besides the several kinds of process which have been mentioned, the demandant was often compelled to resort to several others, by the management of the tenant, whereby he contrived, from time to time, to save or excuse his defaults. The most usual form of excuse, allowed by the ancient law, was denominated an *Essoin*, of which we shall soon take notice.

SECT. IV. *In our practice* the process in real and personal actions is the same. The writ is simple, intelligible, and expressive of the claim or complaint of the

demandant or plaintiff, and the duty enjoined upon the sheriff. The forms are enacted by statute, and must be pursued in all cases in which they afford an appropriate remedy. [92] 3 *Mass. R.* 193, *Cooke vs. Gibbs*. All original suits must be commenced by *summons*, *capias*, or *attachment*; and generally a party has his election, to pursue one or the other at his pleasure. *Mass. Stat.* 1784, ch. 28. Real actions are usually prosecuted by *original summons*, so called to distinguish it from the summons which accompanies the writ of attachment. This writ may indeed be used in the commencement of *all actions*, personal as well as real; an early law of the colony having provided that every plaintiff should be at liberty to sue out either summons or attachment. *Ord.* 1644, *Anc. Chart.* 49.

Before the statute of 1795, ch. 75, the writ in *real actions* might not only be issued, but executed also in the same manner as personal actions. The first section of that statute provides, "that if the *tenant's body* be taken upon a *writ of Ejectment*, or other *real action*, *his own bond*, and no other, shall be required for his appearance to answer to the same." It follows, therefore, that the demandant may institute his suit by either of the writs before mentioned, and is only restricted, as to compelling the tenant to procure bail.

The writ in this, as in all other cases, must be in the *name of the Commonwealth*, sealed with the [93] seal of the court, bear *teste* of the *Chief Justice*, or of the *first Justice not interested*, and be signed by the clerk of the court from which it is issued. *Mass. Const.* ch. 6, art. 5; *Stat.* 1820, ch. 79. It must be dated and served fourteen days at least, before the sitting of the court to which it is returnable, if against an individual, and thirty days at least if against a corpora-

tion. *Mass. Stat.* 1797, ch. 50 ; 1783, ch. 39, § 6. And before it is served, it must be indorsed by the demandant, if he is an inhabitant of the state, or by his agent or attorney, being an inhabitant thereof. But if the demandant is not an inhabitant of the state, his writ must be indorsed by some responsible person who is. *Mass. Stat.* 1784, ch. 28, § 11. If the demandant is a minor, his *prochein ami* should indorse. 17 *Mass. R.* 222, *Crossen vs. Dryer*. It may be added, that an error in the *teste* or date, or an omission to indorse the writ, can be taken advantage of only by plea in abatement, and is cured by a general appearance and pleading to the action. *Tid. Prac.* 91 ; 7 *Mass. R.* 209, *Prescott vs. Tufts*.

All writs in *real actions* must be served by the *sheriff* or *his deputy* ; or when either of them is party or interested, or the office of sheriff is vacant, by some *coroner of the county*. *Mass. Stat.* 1783, ch. 44 ; 1792, ch. 17. But if process is served by a deputy sheriff, where [94] another deputy is party, the process is not void, though it will be set aside on motion or plea. 11 *Mass. R.* 181, *Gage vs. Graffam*. As no damages are given in Real Actions, the only inducement to make *an attachment of property* is to secure a fund, from which the bill of costs that shall be recovered may be satisfied. It is usual, therefore, in these cases to make only a nominal attachment.

SECT. V. *The indulgence of the ancient law* allowed both parties, in real, as well as personal actions, who had been summoned, or *ought to attend* in any suit, to excuse their absence, for some supposed just cause. *Flet.* lib. 6, ch. 7, 8 ; *Co. 2 Inst.* 125 ; [Booth, 14.] These excuses were denominated *essoins* ; and they were originally provided by the law, as a protection to parties, from the injury or prejudice to which they

would otherwise have been liable, even for an inevitable absence. There were in ancient times five *principal* essoins, which were allowed both in real and personal actions. 1. That the party was in the king's service. 2. That he was in the holy land. 3. That he was beyond sea. 4. On a sick bed. 5. Sick on the road. And this last was called the *common essoin*. Besides these, there were *special* essoins, allowed in *real*, but not *personal* actions. *Flet.* lib. 6, ch. 7. Some of these essoins likewise were allowed in one kind [95] of real action, but not in another. Thus the essoin of *being in the king's service*, (which generally occasioned great delay,) was not allowed in *Dower*, *Quare impedit*, *Assize of darrein presentment*, or of *novel disseisin*. 39 H. VI. 40; *Co. 2 Inst.* 124.

To guard against the abuses which were frequently practised, the common law had provided in some cases, as the statute of Marlbridge (Ch. 19.) afterwards did in others, that the truth of the excuse should be *verified by oath* of the party. But the common essoin, of *sickness on the way to the court*, (as it occasioned but little delay,) was not required to be *warranted*, as it was called, by oath.

As the essoin of *beyond sea*, was often falsely alleged, the parliament interposed, and allowed the demandant to challenge it. *Stat. West.* 1, ch. 44; [13 *Edw.* I.] And if it was found that the tenant was within the four seas, on the day of the summons, and *three weeks after*, the essoin was turned into a default, and the tenant lost his land, as a punishment for falsely delaying the demandant. *Co. 2 Inst.* 253. Afterwards the same provision was enacted to prevent a similar practice in the essoin of *being on a sick bed*. *Stat. West.* 1, ch.

17. But the greatest abuse of this well-meant [96]

indulgence to tenants, was practised by *joint-tenants*, *parceners*, and *tenants in common*, all of whom the demandant was obliged to join in the suit. If there were three or more of them, the *first* might essoin, and the other two appear at the return of the summons. Then all must have *the same day given them*, at which day the *second* would essoin, and the other two appear, and so on to the last. After each had been allowed his essoin in their order, the first might essoin *again*, and so on. This is what was called *fouching by essoin*; which was so much abused, that the parliament first prohibited it as to joint-tenants and parceners, (*Stat. West.* 1, ch. 43,) and afterwards as to husband and wife. *Stat. Glouc.* ch. 10; see 2 *Saund.* 45. n. 4.

Essoins were allowed, not only before, but after appearance, after view, and before and after issue joined. They were not confined to the original parties to the suit, but extended to the *prayer in aid* and the *vouchee*. And after the vouchee had been essoined, and the same day given to the tenant, demandant, and vouchee; *the tenant was still permitted to essoin again*. *Booth*, 42; *Hob.* 46, *Clanrickard vs. Lisle*.

Such are some of the most important particulars in these dilatory and strange proceedings, so oppressive to the demandant, and so reproachful to the law. It is not surprising that the judges in England, and indeed *the whole nation*, should have been anxious to get rid of the system of *Real actions*, if they believed, (as it seems they did,) that it was impossible to retain them, and at the same time to strip them of these intolerable appendages. *Fortunately*, as has been before hinted, the doctrine of essoins was never admitted into our practice; and our experience has clearly shown, that it is by no means incompatible, *to retain*

what is valuable and useful in the ancient law upon this subject, *and to reject what is useless and pernicious.*

SECT. VI. Where an action is commenced in the name of several persons, *one or more of whom refuses to proceed*; as the others cannot go on without him, the action, whether real or personal, (where such party cannot be severed from his companions,) is at an end. But that one of several plaintiffs or demandants might not have it in his power, either through obstinacy or fraud, to defeat the rights of another, who had the misfortune to be connected with him; the law early provided, that where several were *compelled to join* in one action, if one or more refused to appear and prosecute, *a summons should be awarded* to the persons so refusing, requiring them to appear at a certain day, to prosecute, together with the others who chose to proceed in the suit. If, at the return of such [98] a summons, those to whom it is awarded, do not appear, judgment is given, that *they shall be severed*, and that the other plaintiffs or demandants *shall sue alone.* *Bro. Summons et Severans* 4, 10, 16; *Bac. Abr. Sum. & Sev. A.* This proceeding is denominated SUMMONS AND SEVERANCE; and at common law it lies generally in real actions, and actions that savor of the realty, as *Detinue of Charters, Warrantia Carta*, and the like. [See post ch. iv. § 14.] But if a party who refuses, or is disabled to sue, be *improvidently* joined with others in a suit, where they might have proceeded without him, such party cannot be severed; and if the tenant makes the objection *in season*, the writ will abate, or the action must be discontinued. 10 *Mass. R.* 131, *Poor vs. Robinson.*

By our statute of 1785, ch. 62, co-heirs, and joint-tenants may all, or any two or more of them, join in an

action of *Waste, Ejectment, or any other real action*, for the recovery of their lands; or each one may sue alone for his particular share. Since that statute, therefore, as they are no longer compellable to join in such actions, according to the ancient principle, *summons and severance no longer lies*, in the case of co-heirs and joint-tenants. But if several of them joined, and [99] any one of them afterwards became disqualified, (as by a *release*, or the marriage of a *feme sole*;) or if one *refused* to prosecute, they were of course subjected to all the inconveniences of a joint action at common law. 10 *Mass. R.* 131, *Poor vs. Robinson*; *Ib.* 179, *Oxnard vs. Proprietors of Kennebeck Purchase*.

After one has been summoned and severed, he can no longer defeat the proceedings, or prejudice the other parties to the suit by his acts; as by entering upon the lands demanded, or in the case of a female, by marriage pending the suit. 10 *Co.* 134, *Read & Redman's case*.

It is manifestly for the advantage of all concerned, that questions of title should, if possible, be decided in one, rather than a number of suits. And it has accordingly been suggested from a most respectable quarter, that the subject was deserving the attention of the legislature. See 10 *Mass. R.* 180.*

* Since the former edition was published, the statute of 1826, ch. 70, has made an important change in the law upon this subject. The first section provides that the suit shall not be abated by the death, marriage, or other disability of the demandant. But the heir, or such other person, as would, if the suit were abated, be entitled to commence the like action, may be permitted to prosecute. And if one or more of several demandants die, or be disabled, the heir, &c. may prosecute the suit jointly with the other demandants; and shall be entitled or subjected to costs, as an original demand-

SECT. VII. By the ancient law, the party against whom a suit was commenced, instead of taking upon himself the defence of the action, in many cases might call in another person, either *to defend* in his behalf, or to *aid* and protect him in his defence. If he was sued for land in a *real action*, which some person was bound by his *warranty* to defend, the proceeding, by which such party was called into court to defend the title he had warranted, was called *VOUCHER*, [100] of which some account will be given hereafter. *Chap. 3, § 6, 7.* But the action might be brought against one, who, though he had *possession* of the thing demanded, had not the complete and entire property. In this case, if judgment passed against him who was sued, some other person who had the ultimate right, would be injured. And he *could not vouch* in such a case, because that was permitted *only where the tenant held an estate of freehold*, and had also the warranty of his feoffor or grantor. *Co. Litt. 385, a.* The law therefore allowed such a party to *pray the aid* of him who had the title, to defend the suit. *1 Danv. Abr. 291, 303.*

AID PRAYER was not confined to *real actions*, but was also allowed in *personal actions* which involved the title to the realty, as in *Trespass, Replevin, Annuity,*

ant. By sect. 2, if one or more of the tenants, against whom a real action is pending, shall die before judgment is rendered, the action may be prosecuted against the surviving tenant or tenants, for such part of the premises, as they then hold or claim. And in all such cases the court shall allow such amendments of the declaration and other pleadings, and such suggestions on the record as the case may require. And by *stat. 1828, ch. 120*, it is further provided, that on the marriage of any *feme sole*, after service of process in any case in which she may be demandant, plaintiff, or petitioner, the husband, on motion, may become party, and the suit shall not abate.

Scire Facias, *Attaint*, and some others. 3 *Reeves' Hist.* 445; [*Booth*, 60.] As the king could not be vouched, his grantee might *pray him in aid*. This however was confined to those cases, in which the king might be liable to suffer damage, or the title to a freehold derived from him was drawn in question. 1 *Danv.* 269, 271.

Aid of the king therefore was of two kinds. *First*. [101] Upon the warranty, for the purpose of recovering in value, for the land of which his grantee had been evicted; and then it was a substitute for a *voucher*. *Second*. Where it was founded upon the slenderness of the tenant's estate, and then it resembled the proceeding, by which any *common person* was called upon to aid, or to defend for the tenant.

Upon demand of aid, if the prayer was granted by the court, a *judicial writ*, called a summons *ad auxiliandum*, was sued out by the tenant. At the return of the writ, if the *payee* did not appear, or *essoin*, or if he afterwards made default, judgment was entered, "that the tenant should answer to the *count* without the said A.," the *payee*. *Booth*, 61; 2 *B. & P.* 386, *Onslow vs. Smith*; see the form of the prayer and the summons *ad auxiliandum*, *Appendix*, No. 41, 41 a.

Tenant for life generally had his option to vouch the reversioner, or pray him in aid. 9 *H. VI.* 3. When the remainder was limited *in fee* to tenant for life and another, if tenant for life was impleaded, he should have *aid of the other*. And the tenant for life might have aid of the remainder-man in fee, without showing any deed; because there might be a feoffment without deed. 22 *H. VI.* 1.

A party who is in by his own wrong, as *abator*, [102] *intruder*, or *disseisor*, is not allowed to pray in aid. 1 *Danv. Abr.* 287. Therefore in a writ of

Entry in nature of an assize, aid might be prayed of the reversioner ; but not in an *assize*, because in that action the tenant is supposed to be in by his own *tor-tious* act. 14 H. VI. 22 ; 4 Ed. IV. 14 ; 21 Ed. IV. 15.

Aid should be prayed before a general imparlance. If prayed afterwards, it is bad on general demurrer, and the court will give judgment that the tenant answer alone. 2 B. & P. 384, *Onslow vs. Smith* ; 2 Saund. 45, *e. note*.

In voucher and aid prayer, the party is brought in to defend, *at the request of the tenant*. But the tenant may *collude* with the demandant, and suffer judgment to go against him, to the injury of some person interested in the estate. The law therefore made provision that *such interested party* might *pray to be received* to defend his freehold or inheritance. 2 Reeves' Hist. 151. The proceeding by which such party was permitted *at his own request* to defend, was called RECEIT. See the form of the prayer to be received, Appendix, No. 42.

The time of praying to be received was when judgment was about to be given for the demandant, without further process. And the person received might plead most of the pleas, and take all advantages of *voucher*, *aid*, &c. which the tenant might, but [103] could not *imparl*, or *essoin* ; and if he suffered a default, it was peremptory. 3 Reeves' Hist. 447.

The demandant might, by way of plea, allege some matter against these applications for aid, or permission to defend ; and this was denominated *counterpleading* the *aid* or *receit*. The most common counterplea to aid prayer, was, that the *prayee had nothing in the re-version* at the day of the writ purchased.

Aid prayer is now seldom resorted to, especially in our practice, except in writs of *Right*, where the tenant

has not the absolute or *ultimate fee simple*. And other means having been devised to prevent collusion, *Receipt* is now an obsolete remnant of the ancient law.

SECT. VIII. After the demandant in a real action has *counted*, (which was much the same as filing a declaration in a personal action,) the tenant might pray the court to give him a day to answer the demand, which is called an IMPARLANCE. There are two kinds of imparlance. The one, called a *general* imparlance, is merely praying time to answer, making no objections to the proceedings of the demandant. And this it seems is always to the next term. 6 *Mod.* 28, *Longvill vs.*

Thistleworth. The other, denominated a *special* [104] imparlance, was with an express "saving of *all objections to the writ, bill, or count;*" and sometimes "as well to the *jurisdiction of the court*, as to the writ and count." This last is frequently called a *general special* imparlance. 2 *Saund.* 2, n. 2. The demandant may have leave to imparl, as well as the tenant; and as the days of *special* imparlance are considered as days of grace, the courts are not bound to the *common* days, but may give any particular day they see fit. *Bro. jours*, 52.

After the *general* imparlance, as that is a waiver of all objections, the tenant, of course, can plead no plea to the writ. But after a *special* imparlance, he may plead any plea in abatement, as *non tenure*, *joint-tenancy*, *several tenancy*, and the like. *Palm.* 308; *Keilw.* 93, b. And after the *most special* imparlance he may plead to the jurisdiction of the court. 2 *Saund.* 2, n. 2. Upon this subject therefore the law seems to be much the same in real, as in personal actions; except that in the former the *tenant* is entitled to an imparlance *of course*, upon his appearance. *Com. D. Pleader*, D. 2.

In our practice, an imparlance is merely a continuance of the cause to the next term of the court. And it may be with or without a saving of all exceptions to the writ. It is not, (except in a few particular cases,) a matter *of course or of right*. The court may [105] generally grant or refuse it, to either party, at their pleasure; not indeed arbitrarily, but according to a sound discretion, regulated by their own rules, and the *established course of practice*. And that course is generally the same with us in real and personal actions.

The ancient rule, that a plea in abatement cannot be received after a *general imparlance*, is recognized by our courts. 9 *Mass. R.* 217, *Campbell vs. Stiles*. And it seems that no exception to this rule is allowed, even where the Commonwealth is interested, or party defendant. 1 *Mass. R.* 347, *Martin vs. Commonwealth*.

SECT. IX. The privileges and disabilities of INFANCY were extended much further by the ancient law, than they were at a later period. This will be very manifest, if the law as stated by *Bracton* is compared with the writers and decisions of the succeeding age.

There were some actions which a minor might maintain, and others which he could not. So on the other hand, there were some actions to which he was obliged to answer, notwithstanding his infancy, and others to which he could not be compelled to answer, until he was of full age. He might demand land upon *his own seisin*, by an assize of *Novel disseisin*; or upon *the seisin of his ancestor*, by an assize of *Mort-* [106] *ancestor*. Where the land was held in *free socage*, there was a particular rule established, that the infant could not demand it *in a writ of Right*, until the age of *fourteen*; and where it was a *feudum militare*, he could not sue for it until he was *twenty-one*.

If there were several demandants, as in the case of *parceners*, and *one* was a minor, it was a good plea against *all*. If husband and wife were demandants, and she was an infant, and married *before* the writ purchased, the plea would *remain quousque*, says *Bracton*. But if she married *after* the purchase of the writ, it should *abate*, or the plea should be *suspended* until her full age, *at the election of the tenant*. *Bract.* lib. 5, c. 21, fol. 423. So if the minor demanded *services*, and not lands, the tenant might alledge that he was quit of the services, *quo die et anno antecessor vivus et mortuus fuit*; and he was not held to answer till the demandant was of age. *Bract.* ib. Generally, where a *naked right* descended to an infant, in every action ancestrel, brought by the heir within age, the *parol* should *demur* till his full age; because, according to lord *Coke*, the law judged it less prejudicial to the infant to be delayed of his right, than to run the hazard of losing it forever. 6 Co. 36, *Markel's case*; Dy. 133.

[107] But the cases in which the heir, *who was sued*, was entitled to the privilege of staying the suit until he should come of age, were much more numerous. The principle extended generally, not only to cases where land was demanded against him, but where any claim was made, *in respect of the land*, as debt against the heir, upon the obligation of the ancestor, (2 *Inst.* 89; *Moor*, 74,) annuity, (1 *Roll. Abr.* 140,) execution on a statute merchant, (*Co. Litt.*, 290, a.) or upon a recognizance. 3 Co. 13, *Sir W. Herbert's case*; *Co. Litt.* 290, a.

The cases in which an infant was *not allowed* this privilege, were where the charge was of a fact or wrong committed by *himself*, as in assize of *Novel disseisin*, assize of *Mortancestor*, or writ of *Entry in the quibus*;

or where the charge was upon any thing of which *his ancestor* did not die seised, *in dominico suo ut de feodo*; or in *partition* between parceners where nothing is demanded, but a division of the land; (6 Co. 4, b.) or finally in *dower*, where the law admits of no delay that is not inevitable, because the widow must have a subsistence. 1 Roll. Abr. 137. But if tenant in dower was disseised, and the disseisor died seised, *his heir* was entitled to this privilege against the disseisee. 3 Bulst. 142, *Harbert vs. Bynion*.

Generally, therefore, the parol should demur [108] in all writs of *Right against a minor*, who was in by the seisin of his ancestor, writs of *Formedon*, and writs of *Entry*, which did not charge the infant *himself* with the original wrong or disseisin. 6 Co. 36. So also in *Scire facias* against the heir or *terre-tenant*. 1 Roll. Abr. 140.

This privilege or temporary bar, it may be remarked, is a peculiar feature of the *feudal law*. In the *civil law*, the guardian was party to the suit, and not the infant; and if there was *mala fides* in the defence, he was answerable for it to the infant. But the *wardship of the feudal law* was of a different nature. The feudal lord, as guardian, had the *whole profits* of the infant's estate, which the *law gave to him* during the nonage of his ward. In all cases therefore, where the fee was demanded, or charged in his hands, as in debt on the obligation of the ancestor, or *scire facias* to have execution upon a statute staple or recognizance, or against the heir as *terre-tenant*, the parol should demur. *Gillb. Hist. C. P.* 54, 56. And it is not easy to understand how it should have happened, that this provision should have been extended to heirs who held lands in *socage*, nor why it should continue to be part of the com-

[109] mon law of England at the present day ; though, in consequence of the disuse of real actions, a great portion of it has become obsolete. See 4 *East*, 485, *Plasket vs. Beeby & al.*

Whether its *rejection from our code* was owing to its being considered an appendage of the feudal law, it is perhaps not very important to determine. Whatever may have been the cause, it seems never to have been adopted as a part of our law. And though the claim has sometimes been urged on behalf of infants, it does not appear that it has in any case been allowed, or the claim of it put upon the record, in the form of a regular plea or motion.

With regard to the mode of taking this exception, it may be remarked, as a general rule, that where a mere *naked right* in fee descended, of which the ancestor was once in possession, the parol should demur, *without plea*. But where the ancestor died seised of the land, or the action was brought upon the infant's own seisin, the parol did not demur *without plea*. 6 *Co.* 3, b ; 4, a. And where it was claimed by plea, it might be counterpleaded, by alleging some matter which would defeat the claim, much in the same manner that *view*, *aid*, *prayer*, and *voucher*, were counterpleaded.

[110] SECT. X. In the ancient practice, there were two kinds of *view* in real actions. 1, View by the *party*. 2, View by the *jury*.

1. The necessity of a view by the tenant originally arose from the very general and imperfect description which was given in the count, of the property or thing demanded ; as *one messuage in Dale, two hundred acres of land, one hundred acres of meadow*, and the like, without either *name or abutments*.

As the tenant could not, (like a defendant in trespass,) plead that the land was his *freehold* and thus compel his adversary to give a more precise description, in a new assignment, the law allowed him to require that the land demanded should be shown to him, so that he might know with certainty against what claim he had to defend.

But as this indulgence was soon abused, and the tenant often demanded a *view*, merely to delay the demandant, and not from any want of knowledge of the thing demanded; an attempt was made by the statute of Westminster 2, (13 *Edw.* I. ch. 48,) to prevent this abuse, by prohibiting the granting a view by the court, where it was not necessary. *Co. 2 Inst.* 479. When a view was demanded in the cases prohibited by statute, and a few others in which it was not allowed at common law, (as where a view had *before* been granted, and the writ abated, or where the tenant was charged with having entered by wrong,) the demandant might allege these facts by plea, and thus *oust* the tenant of his *view*. This was called *counterpleading* the view. *Booth*, 37. This kind of view it seems might be demanded, as well *after* as before a general imparlance; and it was commonly the occasion of great delay to the demandant. *Booth*, 39.

View by the party, it seems, *never was allowed* in our practice. But it still continues to be a part of the formal proceedings in a *writ of Right*, (the only real action now used either in England or in most parts of our own country;) and at this day is generally resorted to, merely for the purpose of delay. See 3 *Chit. Pl.* 643; 2 *Saund.* 45, *b. note*; 3 *Johns. Cas.* 237, *Gravesand vs. Voorhis*; *Ib.* 335, *Haines vs. Budd*. When a view is demanded by the tenant, the demandant must

sue out the writ of *View*. 1 *Johns. Cas.* 395, *Schofield & wife vs. Lodie*.

2. *View by the jury* was allowed in several real actions, as *Assize of Novel disseisin*, *Waste*, and *Assize of nuisance*. In these cases, therefore, a view by the party being rendered unnecessary, was not permitted

by the law. 8 *H. VI.* 27; 50 *Edw. III.* 11.

[112] The design of this proceeding was to enable the jury better to understand the matter in controversy between the parties. It was not confined to real actions, but was allowed in several personal actions, for an injury to the *reality*, as *Trespass quare clausum fregit*, *Trespass on the case*, and *Nuisance*.

At the present day the practice on this subject is regulated chiefly by statute, both here and in *England*. By the English statute 4 & 5 *Ann.* ch. 16, § 3, it is provided that where it shall appear to the court to be proper and necessary, in actions of *Waste*, *Trespass*, *Ejectment*, or other actions, that the jury who are to try the issue, for the better understanding of the evidence, should view the messuages, lands, or place in question, a special writ of *distringas* or *habeas corpora* shall be issued, by which the sheriff shall be commanded to have *six* out of the *first twelve* of the jurors, named in such writs, or some greater number of them, at the place in question, some convenient time before the trial, who shall have the matters in question shown to them by two persons, to be appointed by the court, and named in the writ. And the sheriff who executes the writ, is to certify that the view has been had. By a subsequent statute, (3 *Geo. II.* ch. 25, § 14,) it is further provided, that where a view is allowed, *six* of the jurors named in the

[113] panel, or more, (who shall be mutually consented to by the parties, or if they cannot agree,

named by an officer of the court, or by the judge before whom the cause is brought,) shall have the *view*. These six, (or as many of them as shall appear,) shall be *first* sworn upon the jury, to try the cause; and so many others are to be drawn and added to the *viewers*, as are necessary to make up the number of twelve, after all defaulters and challenges allowed.

Before the time of lord *Mansfield*, it seems to have been understood that *six jurors* of the first twelve upon the panel must attend upon the view; and that if those six did not appear at the trial, the cause must be put off. This having occasioned much inconvenience, the judges established a rule, that before a view was granted, the parties should consent, that if *no view was had*, or if a view was had by *any of the jurors*, though not by six of the first twelve, yet the trial should proceed, without objection on that account, or for want of a proper return to the writ. See 1 *Burr.* 253.

SECT. XI. The practice relating to *view by the jury*, in our own country, has generally been regulated by the legislature, and established substantially upon the basis of the English statutes above referred to. In *Massachusetts* the first act on this subject was passed in the 19th year of Geo. II. It provides, that in *all actions* in any court of record, where it shall appear to the court, that it will be proper and necessary that the jurors, who are to try the issues in any such actions, should have a view of the messuages, lands, or place in question, in order to their better understanding the evidence to be given upon the trial, the court may order the jury to the place in question, who shall then and there have the matters in question shown to them by two persons to be appointed by the court. The costs of the view, to be allowed by the

court, were to be paid, before the trial, by the party who moved for the view, or by the parties equally, where the view was by consent; and the party recovering judgment was allowed the sum by him paid, in the taxation of the bill of costs. *Anc. Chart.* 559. These provisions have been substantially re-enacted by statute, 1807, ch. 140, § 8, which provides, "that in *all cases relating to real estates*, either party may have a jury to view the place in question, if the court shall be of opinion that such view is *necessary* to a just decision: *Provided* the party moving therefor shall advance such a reasonable sum to the jury, as the court shall order, to be taxed against the adverse party, in the event of a decision of the cause against him, on the merits, or through the default of such adverse party."

[115] In our practice no *distringas* or *habeas corpora juratorum* is issued, as in England, and some parts of our own country. The duty of the sheriff or officer to whom the jury are committed, is clearly pointed out by his oath, which is administered in court, in the presence of the jury and parties.

It does not seem to be strictly *necessary* to apply for a view by the jury, until the cause comes in course for trial. But it is usual and convenient to apprise the adverse party and the court, before the trial comes on, that such a motion is to be made. But where circumstances occur in the course of the trial which render a view necessary, it may be granted at the discretion of the court, any time before verdict.

The usual course of proceeding is, to call the jury, as in other cases, and the writ and declaration, with the pleadings relating to the issue to be tried, are read to them. Then the judge appoints two persons, (one being named by each party,) to show the premises in question

to the jury. The officer is sworn "to take charge of the jury, and take them upon the premises in question, and there suffer them to view the same as they shall think necessary, and all such lines, monuments, and boundaries, as shall be shown them by either party: not to permit the parties to enter into a debate relative to the premises, in the hearing of the jury, or any [116] person to speak to them upon the subject, unless it be the person appointed by the court, to point out such lines, monuments, and boundaries as they shall deem expedient for the determination of the issue between them, and to keep the jury together until they shall return into court. *See the form of the oath, Appendix, No. 43.* The officer then departs with the jury, who having viewed the premises, return into court, when the trial proceeds as in other cases. And it is manifest that by having the view *while the court is sitting*, we avoid most of the inconveniences experienced in the practice relating to views in *England*.

It is generally held, that the *denial* of a *view by the tenant*, where it ought to be granted, or the granting it, where it ought to be denied, is error. 2 *Lev.* 117, *Astmal* vs. *Astmal*.

But *view by the jury*, as now established by the English statutes and our own, depends upon the *sound discretion of the court*. It seems, therefore, that the granting or refusing it could be no more the subject of a writ of error, than the granting or refusing leave to amend.

A question has sometimes arisen, as to the propriety of the conduct of the persons appointed *to show the premises to the jury*. And in the English [117] courts, motions have been made to set aside the verdict, upon affidavit that *the showers have misbehaved*.

But still the authority of the showers, and the nature of the conversation they may hold in the presence of the jury, do not appear to be well defined.

It has been contended that the premises were *merely to be shown*, with the lines, monuments, and boundaries; and *without a word of explanation*. This seems, however, too narrow a construction of the duty prescribed to the sheriff by his oath. For although *no debate* is allowed, it is clearly admissible and proper, in pointing out the objects to be noticed by the jury, to inform them *to what points the evidence will be directed* upon the trial. But no facts can with propriety be stated to the jury, *as evidence*, either by the showers or by witnesses. See *Barnes*, 452, *Symons vs. Clark*.

Another, and very important *incident* in the ancient course of proceedings in real actions, which we might here mention, is *Voucher* and recovery in value. But this it has been thought most useful to the student, to consider, in connexion with the doctrines of *Warranty*, and *Covenants Real*, which will be discussed at some length in the next chapter.

CHAPTER III.

Warranty, Covenants, Voucher, &c.

SECT. 1. THE ancient law of WARRANTY, [118] from whence are derived some of the leading doctrines concerning *Covenants* which affect the title to real property, constituted the most refined and difficult subject of legal learning. But many of its principles, according to their strict *feudal* notions of tenure, with its appropriate remedy by *Voucher*, and recovery in value, upon an eviction, have become nearly obsolete, even in England. In this country, or at least in this Commonwealth, they have never been adopted, except only as a part of the formal proceedings in a *Common recovery*. 2 *Mass. R.* 438, *Marston vs. Hobbs*.

Still, on account of the space occupied by this subject in the works of the ancient law writers, and the frequent use they make of it, in illustrating their doctrines, it continues to demand a share of the attention of every student who wishes to obtain a thorough [119] knowledge of *real actions*, and the law respecting the alienation of real property.

It is not intended, however, (nor would it be consistent with the limits prescribed to these remarks,) to enter fully into the discussion, or to attempt even a complete outline of the law of warranty. Only such parts of it, therefore, will be referred to, as seem necessary to elucidate the doctrines of *covenants real*, and to ex-

plain the principles upon which the *action of Covenant* has been introduced, as a *substitute* for the ancient remedy by voucher and recovery in value.

But before we proceed to the consideration of this subject, it may be useful to call the attention of the student, for a moment, to the analogy between the general principles of warranty in the civil and the common law.

Natural justice requires that the vendor should acquaint the purchaser with every defect of the title he is to acquire, or defend him in the enjoyment of his purchase, and indemnify him in case of eviction. *Sugd. L. V. 1.* Hence the general principles of *warranty*, variously modified, form a part of perhaps every civil code.

Warranty in the Roman law is the obligation of the vendor to put a stop to the eviction and other [120] troubles which the purchaser suffers in relation to the property purchased. *Eviction* is the loss which he suffers, either of the whole thing purchased, or a part of it, by reason of the right which a third person has to it. *Troubles* are defined to be those claims, charges, or incumbrances, which, without affecting the title to the thing purchased, diminish its value to the purchaser; as a right to the *usufruct*, or some charge, rent, easement, or the like. The general obligation imposed upon the vendor to maintain the purchaser in the full enjoyment of the thing sold, though not mentioned in the contract, was denominated *warranty in law*. But this obligation might be limited by the terms of the contract, either extending or restraining it at the pleasure of the parties, which was called *warranty in deed*. *Dom. B. 1. tit. 2, § 10.*

A similar division into *tacit* and *express* warranty is adopted by *Bracton*, who says that if the charter ex-

pressed that the donor should not be held to warranty, *conventio vincit legem*. *Brac.* l. 2 c. 16, § 11.

But notwithstanding this resemblance, it will readily occur to the student that these principles of the civil law have more analogy to covenants real, than to the warranty, treated of in the Tenures of *Littleton*, which is manifestly of *feudal* origin.

The *feudal* warranty was strictly a consequence [121] of *tenure*, not of *contract*. It was the obligation which that system of polity imposed upon the lord, to defend against all claimants, the title of his tenant to the fee with which he had invested him. If the tenant was evicted, the lord was bound to give him other lands, by way of recompense, equal in value to those he had lost. This obligation of the lord did not commence until he had received the homage of his tenant. When that was received, it bound the lord to acquittal and warranty: that is, to defend his tenant from entry, distress, or other claim, for *services* due to the lord paramount, as well as to defend his title. But at a subsequent period, the claim of the tenant upon his lord, in consequence of the homage he had received, was confined to a particular tenure, denominated *homage auncestrel*. The warranty annexed to this tenure was, in one respect, more advantageous to the tenant than an *express warranty*. In the case of an express warranty, if the tenant was evicted, he could not recover from the heir, unless he inherited lands descended from the *same ancestor* who made the warranty. But it being essential to *homage auncestrel*, that the tenure should have been created before time of memory, it was manifestly impossible to determine *which lands* descended from the ancestor who made the warranty. The law, therefore

[122] charged *all the lands* descended to the heir, from whatever ancestor they might have come.

SECT. II. The practice of *subinfeudation*, which seems to have commenced in England about the beginning of the reign of Henry III. occasioned considerable alteration of the system of warranty established by the feudal law. This was a consequence of the different *tenures* by which, in the cases of subinfeudation, the tenant might hold his estate. It might be held of the chief lord of the fee, or of the immediate grantor himself, or a part of the feudal services might be reserved to each of them, according to the pleasure of the grantor, or the agreement of both parties. This diversity of tenure was a great innovation upon the simplicity of the ancient law, and left the extent of the obligations of grantors to warranty undefined. Lords were desirous of retaining the fruits of tenure, without being obliged to defend their tenants. And they contended, that though the tenure was expressly limited to hold of themselves and their heirs, by *certain services*, they were not bound to warranty without an express clause to that effect, or the receiving of *homage*. This made it necessary for the Parliament to interpose in the fourth year of Edward I. by the act, called from one of its chapters, *De bigamis*. 4 *Edw. I.* ch. 6. By this [123] statute it was declared, "that deeds which contained the words *dedi et concessi tale tenementum*, without reserving homage, and without clause of warranty, and to be holden of the grantor and his heirs by a certain service, should be so construed as that the donor and *his heirs* should be bound to warranty." This provision, however, according to lord *Coke*, was only a confirmation of the common law. 2 *Inst.* 275; and see *Bract.* ch. 6. "But when the deed contained the

words *dedi et concessi*, &c. to be holden of the chief lord of the fee, or of any other *but the feoffor or his heirs*, reserving no service, without homage or clause of warranty, it was declared that the *heirs* should not be bound to warranty, but the feoffor should, during his life." 1 *Reeves*, 144.

Where lands were granted to be held of the chief lord of the fee, without homage, or service reserved to the grantor, it was in the nature of an assignment of the property, or a substitution of one tenant for another; and no tenure subsisted between the grantor and grantee. Warranty, therefore, which was a consequence of tenure, did not hold between them. But though there was no warranty, there was a *gift* by which the donor was supposed to be personally bound. The word *give*, which was the *ancient term* of feudal investiture, imposed an obligation on the part of the grantor, in the nature of a personal warranty during his life, but [124] not extending to his heir. For if it had been allowed to bind the heir, it would *indirectly* have enabled the ancestor to make such an alienation of the property as the law, before the statute of *Quia emp-tores*, did not permit, without the consent of the heir. 1 *Reeves*, 240. This statute, which was passed in the eighteenth year of Edward I., by providing that every freeman might sell at pleasure his lands and tenements, or part thereof, *so that* the feoffee should hold such lands or tenements of *the chief lord*, by the same services and customs by which the feoffor held them, put an end to *subinfeudation of fee simple estates*: and as a necessary consequence, it put an end also to that kind of warranty, which, as a consequence of tenure, was incident to every grant in fee simple *to hold of the grantor and his heirs*. *Butler's n. to Co. Litt.* 384, a.

SECT. III. In the construction of the statute of *Quia emptores*, its operation was limited to alienation in *fee simple*. When the grantor was seised in fee, but only granted an estate in tail, or for life, *reserving a reversion* for himself, and his heirs, the donee in tail, or lessee for life, necessarily held of the reversioner, who continued to hold of the chief lord as before. The old tenure between the lord and his tenant, the grantor, was [125] not transferred from the grantor to the grantee.

A new relation, analogous to tenure, was created between the grantor, who thus retained a reversion, and his tenant in tail, or for life, which was not affected by the statute. Between them the law remained as it was *before the statute*: that is, if the grantor in these cases granted by the word *dedi*, in consequence of the new tenure, both *he and his heirs* were bound to warranty.

But where a person seised in fee, made *at the same time* a grant in tail, or for life to one, and the remainder in fee to another, no tenure arose between the grantor and *either of these grantees*. The old tenure was transferred to the grantees of the particular estate and the remainder-men. They *both together* filled the place of their grantor, and held as he had done of the chief lord.

Thus stood the law in England, after the statute of *Quia emptores*, with regard to grants in fee simple, in tail, and for life; and thus it remains at the present day.

First. That statute, by *putting an end* to subinfeudation of fee simple estates, put an end also to the warranty incident to grants in fee simple, to hold of the *grantor and his heirs*. The consequence is, that in conveyances in *fee simple* no warranty resulting from tenure binds the heir. *Express warranties* may be limited and expressed as the parties please. If, in con-

veyances in *fee simple*, no warranty is express- [126]
ed, there is none implied from the words, "*grant*,"
"*bargain*," "*sell*," &c. or any other word, but the
word "*GIVE*." And that word implies only a *personal warranty*,* during the life of the grantor; and
does not, in case of any eviction in the lifetime of the
grantor, bind his personal representative, like a covenant
broken in the lifetime of the covenantor.

Second. Where the grant is in tail or for life, by the
word "*GIVE*," reserving a reversion in the grantor, the
tenure between the grantor and the donee in tail, or
lessee for life, remains as it was *before the statute*. Of
this tenure, *warranty* by the grantor and his heirs is a
necessary legal consequence: and so unalterable in its
nature is this implied warranty, that it is not restrained
in its operation by any express covenants of a more
limited nature, as an *implied covenant* would be.

Third. But if the grantor, at the same time that he
creates the tenancy in tail or for life, grants over the *re-
mainder in fee* to another; as he parts with the whole
estate at once, the two grants taken together are equiv-
alent to a *feoffment*, and no warranty is implied, though
the word "*GIVE*" be used.

SECT. IV. With regard to *leases for years* the law
was essentially different from the case of a grant of the
freehold. A lease was considered as a chattel.

Co. Litt. 101, b. It was merely a *contract* be- [127]
tween the parties, by which it was stipulated on
the part of the lessor, that the lessee should enjoy the
possession and profits of the land for a certain period;
and on the part of the lessee, that the lessor should re-

* The word "*give*," in a deed of *bargain and sale*, has been held
not to import a covenant of warranty, in the State of Maine. 5
Greenl. 227, *Allen vs. Sayward*.

ceive, by way of recompense, a certain rent. 10 *Mass. R.* 325, *Bates vs. Sparrel*. Against this *express* contract the lessor could not claim to retain possession of the land himself.

But though the tenant received the profits, he was viewed, as to all persons but the lessor, with whom he contracted, rather in the light of a *bailiff*, holding the possession for the lessor, or other person entitled to the reversion. If the freehold was demanded, that demand was brought against the reversioner, while the lessee of the term was disregarded. And in case of a *recovery*, whether rightful or covenous, the freehold was recovered *discharged of the term*. There was no way by which the lessee could *falsify* such claim, or defend himself against it. His only remedy was against his lessor, for a breach of the contract which constituted his lease, until the *stat.* of 21 *H. VIII.* c. 15, allowed him to falsify fraudulent recoveries, and to maintain his lease against the recoverer, in the same manner as against the lessor. 4 *Reeves' Hist.* 238.

In order, therefore, to give full effect to the contract, the lease was construed to be a mutual COVENANT [128] between the parties, though not expressed in the most technical and appropriate language. The words "*yielding and paying*," were held to be a contract *on the part of the tenant*, for the payment of rent, by force of which the lord or lessor might maintain an action of covenant or debt, to recover it, if withheld. While the words "*grant, demise, &c.*" amounted to a like covenant *on the part of the lessor*, that the lessee should enjoy the possession and profits of the land, and recover, by action of covenant, a recompense in damages if he was deprived of them.

The words "*demise and grant*," are often said to *imply a warranty*, on the part of the lessor. But it would be more accurate to say, that they *imply a covenant*, which gives the lessee as perfect a remedy as a warranty. For it differs from the implied feudal warranty in its nature and the form of the remedy. The feudal warranty, as has been before remarked, was the *consequence of tenure*; its remedy was by *voucher* or *warrantia chartæ*. The other being founded on *contract*, the remedy was necessarily *by action* for the breach of that contract. There was also an important difference in their operation, which has been before alluded to. The feudal warranty, like the feudal tenure, was *unalterable*. It could not be *restrained or affected* by express warranties, or any conventional stipulations annexed to it. While the implied cov- [129] enants in a lease might be *modified and restrained* by the insertion of express covenants, according to the pleasure of the parties. And they *are always* so modified, whenever the lease contains an *express covenant* on the part of the lessee for the payment of rent, or on the part of the lessor for quiet enjoyment. 4 Co. 80; 1 Saund. 60.

SECT. V. The statute of *Quia emptores*, having, as we have seen, put an end to the *implied warranty* annexed to a feoffment, it became necessary to introduce into conveyances in fee simple, an *express warranty*, as its substitute. If the lord aliened his seignory, the tenant would not *attorn* to the new lord, until he had obtained an *express warranty* from him. If the tenant aliened his fee, the purchaser required an express warranty from him also. Co. Litt. 365, a. n. 1.

In the construction of express warranties, the ancient principles of the feudal law were in some measure de-

parted from. The warranty could be expressed only by the word "*warrantizo*." It was not binding upon the heir, unless the grantor expressly stipulated that he *and his heirs* would warrant. And the ancestor could no more bind the heir to *warranty*, without binding himself, than he could bind him *to the payment of a sum of money*, for which he was not bound. *Co. Litt.* 386, a.

[130] Express warranty might be either in fee, or for the life of the feoffor or of the feoffee. But if the feoffee was evicted, and recovered a recompense in other lands, he held the land so recovered *in fee* notwithstanding the warranty was *for life only*. *Co. Litt.* 383, b.

The implied feudal warranty was confined to a *feoffment*, and did not extend to other forms of alienation, introduced after the statute of *Quia emptores*. An *express warranty* might be annexed to *every kind* of conveyance of a freehold, as a feoffment, fine, recovery, gift in tail, lease for life, &c. and also a release or confirmation, made to *the tenant of the freehold*. *Co. Litt.* 371. But it could not, as was before observed, be annexed to the interest of a lessee *for years*, nor to that of a tenant by statute merchant, statute staple, or *elegit*. *Co. Litt.* 389, a. The reason assigned by lord *Coke* is, that in any action which lessee for years can maintain, as trespass, &c., a warranty could not be pleaded in bar.

SECT. VI. The *title* of a tenant, to whom or to whose ancestor a conveyance had been made with warranty, might be *assailed*, either by the *warrantor* or by *his heir*, or a *stranger*. When sued by the warrantor or his heir, the tenant might show the conveyance to *rebut*, that is, to repel, or bar the action of the de-

mandant. *Co. Litt.* 365, a. But this rebutting [131] the heir was *not* in consequence of any particular operation of the warranty. For at the common law, whenever the ancestor had the inheritance absolutely, he could alien it from the issue ; so that the *warranty*, as to the purpose of rebutting the heir, was perfectly *inoperative*. *Co. Litt.* 373, b. n. 2.

When a stranger brought a writ of entry or other real action to recover the land warranted, the tenant might *VOUCH*, that is, call into court, the party bound by the warranty, and require him to defend the title. The warrantor, when thus called upon to defend the title of the tenant, was denominated the *vouchee*. If he came voluntarily into court, he was substituted for the tenant, took upon himself the defence, and the demandant *counted*, that is, demanded the land against him as tenant. But the vouchee, when he came into court, instead of taking upon himself the defence of the suit, might *vouch over*, as it was called ; that is, he might vouch *his warrantor*, who might also vouch *in his turn*, and so on to the fourth degree, but no farther. 2 *Reeves' Hist.* 393. And the last vouchee who came into court, was substituted for the tenant, and took the defence of the suit upon himself. *Rast.* 416, a.

If the court gave judgment for the demandant, so that the tenant lost his land, they at the same time awarded *another judgment* for the tenant, [132] to recover against the vouchee other lands *equal in value* to those he had thus lost ; which was called a *recovery in value*. *Co. Litt.* 101, b. If the vouchee was not in court, ready to warrant the land, process, called a *summons ad warrantizandum*, was issued to bring him in ; and if he disobeyed, several other kinds of process were awarded against him in succession. If

he finally appeared, he might take upon himself the defence, in place of the tenant, as before mentioned; or he might deny his obligation to warrant, which was called *counterpleading* the warranty. The demandant also might alledge various objections to the right of the tenant to vouch, which was denominated *counterpleading the voucher*. *Booth*, 50, 53. If the demandant prevailed, where the warrantor had been vouched to defend, the tenant recovered over in value against him, whether he had appeared or not. But this recovery in value was confined to the lands which the vouchee held *at the time of the voucher*.

If the tenant feared a *future eviction*, and that his warrantor might alien his lands before, he might have a process against him, called a *warrantia chartæ quia timet*," in which he surmised that he had been evicted, though *in fact* he had not. The only effect of [133] this proceeding was, that if he was *afterwards* evicted, the recovery in value would extend to any lands which the vouchee had, at the *teste* of the *warrantia chartæ*. *Booth*, 240. A feoffee could have no advantage of a warranty, after he *ceased to be tenant* of the land. *Co. Litt.* 389, a. n. 1. To enable him to vouch, he must have *the whole of the estate* to which the warranty was annexed, in the land, or in some part of it. Where the warranty was annexed to the fee, the tenant who had only a part of the estate, (as a lessee for life, or tenant by the curtesy,) could not vouch. *Co. Litt.* 385, a. But he was allowed, as we have seen, to *pray in aid* of him who had the reversion or remainder, to which the warranty was annexed, and require him to aid in defending the inheritance. *Booth*, 60. The process for this purpose was called a summons *ad auxiliandum*, and might be counterpleaded like a voucher.

SECT. VII. Both voucher and aid prayer, being causes of great *delay of justice*, and often resorted to by fraudulent tenants for that purpose, were in several cases restrained by statute, and in some measure discountenanced, even by the common law. *Booth*, 50.

Where the tenant was evicted without process, and where he was not permitted to vouch his warrantor, the remedy was by an ACTION OF COVENANT, in which he recovered damages instead of a [184] recompense in other lands of his warrantor. In some cases this remedy was preferable to a voucher; because he who had recovered lands in recompense, might be *evicted of them*, as before. *An assignee* might recover in covenant, in many cases where he could not vouch. This is what is intended by the remark of lord *Coke*, "that there is a diversity between a warranty which is a covenant real, that binds the party to yield other lands in recompense, and a covenant *annexed to the land*; for that a covenant is in many cases extended farther than a warranty." *Co. Litt.* 384, b. These considerations, together with some other advantages attending the remedy by action of covenant, caused it to be gradually introduced into the *English practice*, as a substitute for voucher. But the change was chiefly accomplished by the adoption of the *Assize of novel disseisin* (in which the tenant could not vouch, nor pray in aid, except of the *king*,) as the common remedy for the recovery of real property. *2 Inst.* 411; *Booth*, 214. In modern times the practice of trying titles to lands and tenements by the fictitious action of Ejectment, and the almost entire disuse of real actions, has further conducted to the same effect. So that vouchers, even in *England*, except as a part of the formal proceeding of suffering a *common recovery*, have [135]

long been obsolete; and the process of *Warrantia chartæ* has been disused a century, or more. *Booth*, 241.

The effect of the ancestor's warranty in *binding* or *rebutting* the heir, who had no assets from the warranting ancestor, was always confined to those cases in which the heir claimed by *purchase*. In every such case it binds him, either *with* or *without* assets, except where the contrary has been enacted by statute. But on examination, it will be found, that the common law has been so far altered, from time to time, by the statute of *Gloucester*, ch. 3, the statute *De donis*, the 11 H. VII. ch. 20, and the 4 & 5 of *Ann.* ch. 16, that in *England*, the effect of warranty in rebutting or defeating a title which would *otherwise be valid*, is confined to two cases.

1. By the statute *De donis*, the warranty of the ancestor, *with assets*, (to prevent circuitry of action,) *binds the issue in tail*. 2. The warranty of the ancestor, *tenant in tail in possession*, at common law, bars those in remainder, without assets. *Co. Litt.* 373, b. n. 2.

In this state, since estates tail were in effect abolished by the statute of 1791, ch. 60, these cases cease to exist; and warranty, with us, *has no operation, but as a covenant*, binding the warrantor only, or his heirs and devisees also, according to the terms of the con- [136] tract, like any of the other covenants contained in the conveyance. See 9 *Mass. R.* 395, *Austin vs. Gage*; 12 *Mass. R.* 395, *Royce vs. Burrell & al.* The general doctrines and distinctions, with regard to *covenants express or implied, personal or annexed to the realty*, with the remedies of the original parties to the contract, or of those who claim in *privity of estate*, as assignees, *remains the same* in *England*, and *even here*, as in the time of lord *Coke*.

It has been stated in a preceding page, (*see* § 1,)

that the practice of voucher, with recovery in value upon an eviction, was never adopted *in our courts*, except only as a part of the formal proceedings in a *common recovery*. Yet it may be proper to apprize the student, that a practice generally prevailed, until within a few years, and is not wholly discontinued at the present time, which must have owed its existence to some indistinct notions about vouchers.

When a writ of entry, or other real action, was brought to recover lands which had been conveyed *with warranty*, it was usual for the tenant, at the first term, to pray process of the court to *summon his warrantor*, (unless he voluntarily appeared,) to defend the title. Upon shewing the deed containing the [137] warranty, the motion was granted *of course*, and the cause was continued. In the vacation the tenant sued out process, which was called a summons *Ad warrantizandum*, and nearly resembled that ancient writ. *See the form, Appendix, No. 44.* This was served upon the warrantor by the party himself, like a subpoena on a witness, or by the proper officer, like other process. If the warrantor did not appear at the next term, his default was entered of record, and the tenant abandoned the suit, or defended it, as he saw fit. When the warrantor appeared, and undertook the defence he was not substituted for the tenant, as in the ancient practice, but defended the suit in the tenant's name.* If the de-

* Since the above remarks were written, it has been understood that in one or two counties in *Massachusetts*, there have been cases within a few years, in which, upon the appearance of the tenant's warrantor, who came in upon being vouched, the demandant *counted* anew against him, and the suit proceeded in the name of the demandant and the *vouchee*. But it seems that these proceedings have never been followed up by a judgment that the tenant *recover over in value*.

mandant recovered, it was against the tenant. But the tenant did not recover other lands of equal value, against his warrantor, as by the ancient law.

The delay occasioned by this kind of voucher was sometimes objected to on the part of the de-
[138] mandant ; but there were probably no instances of a regular *counterplea*, either to the *voucher* or the *warranty*, put upon the record. The ancient principles, applicable to these proceedings, were not regarded, nor perhaps generally understood. No attention seems to have been paid to the *rule of the common law*, "that he only could vouch, who had *the whole of the estate*, to which the warranty was annexed, in the land, or in some part of it." All tenants, against whom the land was demanded, (as well those who held for life, as tenants in fee simple,) were allowed this kind of voucher. Several grantors of different parts of the demanded premises were vouched, or summoned by the same writ ; and no exceptions seem to have been taken, either by demurrer, or motion to set aside the voucher, for any alleged irregularity.

These proceedings were considered as only *laying the foundation* for an action of covenant against the warrantor, to recover the damages occasioned by the eviction. The only effect, therefore, being to give notice of the pendency of the suit, to the grantor, which could be as effectually, and more conveniently done by serving him with a *copy of the demandant's process*, this practice is now generally adopted ; and the proceedings by voucher, as above stated, have of late been almost wholly discontinued.

CHAPTER IV.

WRITS OF ENTRY AND THE PROCEEDINGS THEREIN.



PART I.

The several kinds of writs of Entry, and their application as legal remedies.

SECT. I. ACCORDING to the strictness of the [139] ancient common law, he who had suffered an injury to his real property, amounting to an *ouster*, was without remedy, unless there could be found in the REGISTER, a writ *exactly suited to his case*. For the writ being regarded as the *commission of the king* to the judges, to do justice between his subjects, the *slightest departure* from the form prescribed by the law was a fatal objection. But such is the extent and variety of this venerable collection of *original writs*, that perhaps no case could arise in which the party injured by an *ouster* would not find a remedy for the injury he had suffered, which *clearly described his case* in the compass of a few lines, without the omission of any material circumstance. So comprehensive and complete is this catalogue of precedents, that the provision [140] of the statute (13 *Edw.* III. ch. 24,) for framing new writs, seems to have been almost unnecessary. And it is justly remarked by *Blackstone*, that it was equally creditable to the ancient law, that it should contain such a provision, and that there should be so rarely occasion to use it. 3 *Bl. Com.* 184.

This great collection of writs is arranged under several classes, as *writs of Right*, *writs in the nature of writs of Right*, *writs of Entry*, and *writs of Assize*. But much of the refinement and nicety of the ancient law has been wisely excluded from *our practice*; and many principles derived from the doctrines of feudal tenure, are foreign to *the nature of our titles*. Few, therefore, of this great variety of writs have been found necessary for our purposes. We have accordingly adopted the general *writ of Right*; (See *Booth*, 87; *Reg. Brev.* 4,) *writs of Formedon*, and the *writ of Dower unde nihil*, both of which are denominated *writs in the nature of a writ of Right*; and also the writs of *Entry sur disseisin* and *Entry sur intrusion*, with several other writs of Entry. *These writs*, (as modified and applied by our law of real property,) have been found to *possess sufficient variety of form*, to afford an appropriate and convenient remedy for every injury amounting to an *ouster*.

[141] SECT. II. WRITS OF ENTRY, of which we shall first take notice, were probably introduced after the time of *Glanville*. The earliest mention of a writ by that name, is in the beginning of the reign of Henry III. *Brac. lib. iv. c. 35*, p. 219. It is supposed they were originally invented as *a substitute for writs of Right*, in certain cases; and to avoid the *trial by battle*, to which the tenant was entitled in that action. 1 *Reeves' Hist.* 388. Though usually denominated *Possessory actions*, they were intended to decide, not only questions of *possession*, but of property also. It is accordingly remarked by *Bracton* that questions *de possessione* were determined by *Assizes and Recognitions*; questions *de proprietate*, by *writs of Entry*, by a jury, upon the testimony and proof of those who could prove

the case *de visu suo proprio et auditu*. But if the entry was too ancient to be proved *proprio visu et auditu*, as this action was *in jure proprietatis*, it might sometimes be changed to a writ of *Right*, (*propter longissimum ingressum*,) by the *narratio* or count. And every entry was denominated *longissimus ingressus* which could not be proved by what the witness had himself *seen and heard*; but must of necessity be proved by tradition: that is *visu et auditu patris*, by what the *father* had seen and heard, and of which he had enjoined his *son* to give testimony. In this case, for want [142] of proof, the tenant was compelled to put himself upon the *Great assize*, or defend himself by *duel*. *Brac.* lib. 4, tr. 7, c. 1, p. 318; 1 *Reeves' Hist.* 365, 387, 390. A writ of *Right*, on the other hand might become a writ of *Entry*, by the form of the count, where the entry could be proved *proprio visu et auditu*. *Brac.* lib. 4, tr. 4, c. 4, p. 283, 284. But though the demandant in a writ of *Right* might count as upon a writ of *Entry*, alledging that he was ready to prove it by a jury; yet, as the tenant had his election, either to defend himself by the *duel*, to put himself upon the *Great assize*, or to try the fact of the entry by a jury, a writ of *Entry* could not become a writ of *Right*, but by his consent. *Brac.* lib 4, tr. 7, c. 1, p. 318, b.

With these distinctions, which owed their existence to the different modes of trial, adopted in ancient times, we of course have nothing to do in our practice.

All writs of Entry, of which in the ancient law there were many different kinds, may be arranged under two classes. First, Where the seisin of the tenant *originally commenced* by wrong, committed either by himself, or by some person under whom he claims. The second class includes those cases, where the seisin of the

[143] the tenant is not alledged to have *commenced* by wrong, but the injury consists in wrongfully *withholding* the seisin, after the estate of the tenant *has expired*, or been otherwise *determined*; or finally where the title was *originally defective*.

I. The *first class* comprehends those writs of Entry which are brought against a tenant, who acquired the seisin *by wrong*, that is by *disseisin*, *abatement*, or *intrusion*, done either by himself, or by some one under whom he entered. Of this class are all writs of *Entry sur disseisin*, which may be brought, not only against the party who *committed the disseisin*, but against all those who come into the seisin under him. *Co. Litt.* 238, b; 239, a; *Booth*, 174. Such also were the old writs of *Mortancestor*, *Ayle*, *Besayle*, and *Cousinage*, (now obsolete,) which were the ancient remedies against those who came into the seisin after the ancestor's death, by *abatement*. Of the same class are writs of *Intrusion*, which lie against those who enter upon the estate, before the reversioner, upon the death of tenant in *dower*, tenant by the *curtesy*, or indeed any *tenant for life*; and which may be maintained by the *reversioner in fee*, or his *heir*; and also by the *reversioner for life*, or the successor or assignee of *any reversioner*. *Booth*, 183; *Reg.* 233, 234; *Rast.* 415, 416.

[144] II. The *second class*, (which are *more strictly* denominated *writs of Entry*,) do not charge the tenant with having committed any *direct wrong*, but admit that he came to the seisin of the freehold *lawfully*, that is, *by some conveyance* to himself, or *as heir or grantee* to one who had a defeasible estate, or at least the *actual seisin*. Of this sort is the writ of *Entry ad communem legem*, which was the ancient remedy for the reversioner against the grantee of tenant in *dower*, or

tenant by the *curtesy*, after the death of such tenant. *Booth*, 190; *F. N. B.* 207. Such also was the writ of *Entry ad terminum qui præterit* which was brought by the lessor, or the grantee of the reversion, against the lessee for life, or years, or his assignee, who held over after the expiration of the term. *Finch*, 92, a; *Booth*, 172; *Reg.* 227. Of the same class are the writs of *Cui in vita*, (*Booth*, 185; *Reg.* 232, b; *F. N. B.* 193,) *Cui ante divortium*, (*Booth*, 188; *Reg.* 233, a; *F. N. B.* 204,) *Dum fuit infra ætatem*, (*Booth*, 193; *Reg.* 228, b; *F. N. B.* 192,) *Dum non fuit compos mentis*, (*Booth*, 189; *Reg.* 228, b; *F. N. B.* 202,) and many more enumerated in the *Register*.

The distinction which we have noticed with regard to writs of Entry, between those that admit the tenant's seisin to have commenced *rightfully*, and [145] those which show that it commenced *by wrong*, (though not generally much attended to in practice,) it will be useful for the student to bear in mind. It refers chiefly to the form of the writ and count in the ancient practice; and in our own, to the count or declaration, which constitutes a part of the writ.

In the *latter* class of writs, the demandant, after mentioning the manner of the entry, states the injury of which he complains, to consist in a *deforcement*, or wrongful withholding the possession from him by the tenant. But in the *other*, the writ begins with an averment that the seisin of the tenant *commenced by wrong*, committed either by himself, or by some other person whom the demandant names, and under whom he affirms that the tenant obtained his *seisin*. Both kinds of writ show, not only the manner or nature of the tenant's entry, but they also state *the reason* wherefore the seisin ought not to be withheld from the demandant. And it

is from this statement of the circumstances of the ENTRY, that these actions derive their name of WRITS OF ENTRY. *Booth*, 172.

The writ of *Entry sur disseisin*, when brought against the disseisor himself, *by the disseisee*, is generally called by the old law writers, a writ of Entry in the [146] *nature of an Assize*, because it may be brought instead of an Assize; and this it seems lay at the common law. *Reg.* 228. The writ by the *heir of the disseisee* against the *disseisor*, was given by the statute of Westminster I. ch. 47; and *this only* is, in *strictness*, a writ of ENTRY IN THE QUIBUS. *Reg.* 229; 3 *Reeves' Hist.* 33. The former, however, is by *Fitzherbert*, and after him by *Booth*, called indifferently by either name. *Booth*, 174; *F. N. B.* 191. And [147] both *Coke* and *Finch** seem to consider the writ of Entry in the nature of an *Assize*, and in the

* Finch says, *Briefes Dentry, que surdout sur un ouster, sont sur un disseisin, ou sur un intrusion. Sur un disseisin, quant le disseisin est fait a luy, ou ces auncestors, come Briefe Dentry en le Quibus, ou, (que est tout un,) en nature del Assize.* Finch, L. 91, a.

These writs are precisely the same in form, except that the latter, (like all writs brought by the heir,) contains the clause *of title*, as it is called, viz. "*quod clamat esse jus et hæreditatem suam.*" The name of this, as of many other writs, is derived from certain words contained in the *established form*; in this case from the words, *DE QUIBUS*, or *DE QUO*, which were always required to be inserted in the writ and in the count. But as the same words are also in the writ of Entry in nature of an *Assize*, there seems to be no reason why both should not be called writs of Entry in the *Quibus*; but that the first had a different name before the second was established.

Count in Entry in the nature of an Assize.

J. S. petit versus J. dncem Suffolk, sex acras terræ, cum pertinentiis, in T., DE QUIBUS idem dux injuste et sine judicio disseisivit prædictum T. &c. *Rast.* 273, b.

Count in Entry in the Quibus.

J. C. filius et hæres T. C., petit versus T. N. centum acras terræ cum pertinentiis in C., ut jus et hæreditatem suam, et DE QUIBUS idem T. injuste et sine judicio disseisivit prædictum T. C., patrem prædicti J. C., cujus hæres ipse est, &c. *Rast.* 279, b.

Quibus, as the same. *Co. Litt.* 238, b; *Finch*, 91, a. In our practice, all writs of *Entry sur disseisin*, against the disseisor, whether brought by the disseisee or by his heir, are usually styled indiscriminately, writs of *Entry in the Quibus*. See 2 *Saund.* 38, n. 4; *Com. D. Pleader*, 3 A. 1.

SECT. III. Writs of Entry, it is to be further remarked, are of four kinds, or denominations, which are derived from the *origin* of the injury complained of. *Co. Litt.* 238, b; *F. N. B.* 201. The *first*, (and of this kind is the writ of Entry in the *Quibus*, of which we have just spoken,) is where the suit is against the party who committed the wrong, whether abator, intruder, or disseisor. The *second*, which is called a writ of Entry in the *PER*, is where the tenant, against whom the action is brought, is either heir or grantee of the original wrongdoer. It has its name from the allegation in the writ, that the tenant has no entry into the lands, but by C. the disseisor, who demised the same to the tenant.* This descent or conveyance from the party who committed the wrong, is said to make a *degree*, by removing the claim one step from the original [148] author of the wrong. The *third* is denominated a writ of Entry in the *PER* and *CUI*. This name applies where there have been two descents, or two alienations, or one alienation and one descent. The writ alleges that the tenant has no entry, but by C. to whom D. demised, who thereof disseised the demandant, or his ancestor.† The *fourth* is where the wrong is removed beyond the degrees before mentioned; and

* *In quod idem A. non habet ingressum, nisi PER C. qui illud ei dimisit, &c.* Regist. 229.

† *In quod idem A. non habet ingressum nisi PER C. CUI D. illud dimisit; qui inde injuste et sine judicio disseisivit, &c.* Regist. 229.

is called a writ of Entry in the *POST*. It does not enumerate the several descents, or alienations, (*Co. 2 Inst.* 154,) as the others do; but only alledges, generally, that the tenant has no entry but *after* A. who was the original disseisor.*

Formerly, it seems, if there had been more than two descents or two alienations, the degrees were said to be past; and the demandant was put to his *writ of Right*. *Ib.* 153. But the statute of *Marlbridge* (52 H. III. ch. 30, A. D. 1267,) gave the demandant a writ of Entry *after*, or beyond the degrees before mentioned, as well where the degrees were past, as where the tenant [149] came in by *disseisin, intrusion, abatement, succession*, or *as tenant by the curtesy, &c.*; in which last cases it seems to be agreed there was a writ of Entry in the *POST*, at the common law. *2 Inst.* 153; *Booth*, 173; *Finch*, 90.

These distinctions with regard to the degrees in writs of Entry, it is still necessary to observe; (*Co. Litt.* 238, b,) though the objection to a mis-statement in this respect, could be taken advantage of only by a plea in abatement. *Rast.* 249, a; *Booth*, 179; *Keiko.* 93, a; *See the plea, App. No.* 56.

SECT. IV. It has already been observed, that it is necessary in all real actions, to state with precision the *nature of the wrong* of which the demandant complains. But it may be useful to the student to be a little more particular on this subject.

In writs of Entry, the principal circumstances to be attended to, in framing the count or declaration, are the proper statement of, 1. The things demanded by the

* *In quod idem A. non habet ingressum, nisi post disseisinam, quam L. inde injuste, et sine judicio fecit C. patri, (vel alio antecessori,) prædicti B., cujus hæres ipse est, &c.* *Regist.* 229.

writ. 2. The demandant's title. 3. The nature of the injury complained of. 4. The seisin of the demandant or his ancestor. 5. Within what time. 6. The *esplees*. 7. The particular statement of the injury.

First. Writs of Entry are properly denominated *Pleas of Land*; and they lie only for a freehold or inheritance in lands and tenements, in which the [150] lands alone are recoverable, without damages.

Finch, 85, a. By the ancient law, *tenementum* included not only lands, but incorporeal inheritances, in which a man might have a freehold, as rents, commons, and the like. *Co. Litt.* 6, a. And for these a writ of Entry might be maintained.

With us the word *tenement* is applied exclusively to land, or what is usually denominated *Real property*. It includes only *immoveable corporeal hereditaments*; and for these alone this action lies.*

The property sued for may be described as a [151] "*tract of land*, containing so many acres;" or "*so many acres of land*;" or "*a certain messuage*,"

* By a statute of Mass. 1795, ch. 53, pews in houses for public worship, are made *real estate*; and a writ of Entry may be maintained for the recovery of them. 10 *Mass. R.* 323, *Bates vs. Sparrell*; 17 *Mass. R.* 435, *Gay vs. Baker*. In *Boston*, however, by a subsequent statute, 1798, ch. 42, they are declared to be personal property.

It is said by *Fitzherbert*, that a writ of Entry *sur disseisin* lieth of a *Stream*, and the writ shall be, *Præcipe A. quod reddat unum gurgitem*; and that the *esplees* shall be laid in the taking of the Fish. So also, that it lies for a *Passage*; or a common of pasture *ad decem boves*. But such actions probably would not be sustained with us. It is also said, that where the *disseisin* is of land covered with water, which is afterwards made *meadow* by the disseisor; or where one is disseised of land upon which a house is afterwards erected, the writ brought by the disseisee shall be for a *meadow*, and for a *house*. *F. N. B.* 190, 191.

called by a particular *name*, by which it is known, or with the *abuttals*.

According to the old doctrines, it would not be sufficient to demand *a certain tenement*, because that word includes *incorporeal*, as well as corporeal hereditaments. *Stran.* 834, *Goodtitle vs. Walton*. Perhaps, however, the distinction would not be now regarded for the reason before suggested. The only practical rule seems to be, that the description should be so certain, as to enable the tenant to understand what is demanded against him, and the sheriff to deliver the seisin, without any information from the demandant. 2 *Ld. Raym.* 1470, *Bindover vs. Sindercombe*. But when the object of the suit is to settle a disputed *line or boundary*, the subject of the controversy should be described with the greatest precision. The same thing must not be demanded *twice* in a writ of Entry; as where a messuage and a house which is part of the messuage, are demanded in the same writ. This is denominated *bis petitum*.

Com. D. Pleader, 3 *A.* 4; *West. Symb. pt.* 2. 77, b.

[152] *Second.* In all cases where the demand is upon the *seisin of the ancestor*, it is proper to *count* or declare *with title*, as it is called: which is subjoining to the description of the demanded premises, the words "which he claims to be his right and inheritance," *quod clamat esse jus suum et hereditatem*. *Rast.* 271, b. 279, b; *Reg.* 229. The same form was adopted where a woman sued a *Cui in vita*, or a *Cui ante divortium*, if she claimed a *fee simple*. *Reg.* 232, 233; *Finch*, 91.

In a few ancient precedents of writs of Entry upon the demandant's *own* seisin, we find the words, "*quod clamat esse jus suum*." But in this case it is more correct to omit the whole clause,

Third. The nature and circumstances of the tenant's entry should always be stated with accuracy and precision. If he came into the seisin *rightfully*, and the injury consists in a *withholding* the estate by *wrong*, it is necessary to state the manner in which he entered; whether *immediately*, as alienee of him who had the right, or by one who derived title from such alienee; and to conclude the charge by alledging a wrongful *de-forcement* of the demandant by the tenant.

If the tenant *came in by wrong*, it must be shown whether it was by *abatement*, *intrusion*, or *disseisin*; and also whether it was by his *own act*, or [153] by that of his *ancestor* or *grantor*. And further, if the seisin of the tenant commenced by *abatement*, it must be stated that the demandant is *heir*; if by intrusion, whether he claims as *remainder-man*, *reversioner*, or *assignee*; and finally, if the tenant is in by *disseisin*, it must appear whether the demandant complains of a disseisin done to himself, or to his ancestor. *Reg.* 228, 234; *Rast.* 271, 279, 416.

Fourth. In writs of entry, the *seisin* of the demandant, or of him, under or after whom the demandant claims, must be correctly stated. If the demandant complains of a disseisin to himself or his ancestor, he must expressly alledge a *corresponding seisin*. Thus where he demands the *inheritance* upon his *own seisin*, he must alledge that *he* was seised of the "demanded premises," "of the said messuage," or "of the lands or tenements aforesaid," *with the appurtenances*, in his demesne *as of fee*; and where he claims only an estate *for life*, the averment should be, that he was seised in his demesne *as of freehold*. If he sues as heir, he must in the same manner alledge that the *ancestor*, under whom he claims as *heir*, was seised in his

[154] *demesne as of fee*. And where the ancestor is tenant *pur autre vie*, under our statute, (1805, ch. 90,) the proper allegation is, that he "was seised in his demesne *as of freehold*, for the term of the life of one J. S. who is yet living."

Where husband and wife are demandants, it must be stated that *they* were seised in *right of the wife*. 1 *Saund.* 253, n. 4; *Doug.* 329, *Polyblank vs. Hawkins*. And where the complaint is not of a disseisin, but of a *deforcement*, or holding over, after the determination of a rightful estate, as where the action is against the *alienee* of the tenant in tail, tenant in dower, or by the curtesy, or other particular tenant, the seisin of such party in *fee tail* or *for life*, should always be alledged.

Fifth. The time within which the seisin must be averred, depends upon the statute which limits these actions. This time by our law is *thirty years*; and is the same when the action is founded on the seisin of the demandant's *ancestor*, as upon *his own* seisin. Even in a *writ of Right*, if founded upon the seisin of the demandant, the time is the same; and *forty years*, when upon the seisin of the ancestor. *Mass. Stat.* 1786, ch. 13, § 3; and 1807, ch. 75, § 1, 2. If the demandant should unnecessarily aver a seisin, within a *less* period than the statute allows, as *ten* or *twenty years*, it

[155] seems he must fail, if he cannot prove it within that time, unless he can obtain leave to amend. *Finch, L.* 88; [See 2 *Pick. R.* 23, *Holmes vs. Holmes & al.*] It is therefore always advisable to state the longest time the law allows.

Sixth. In writs of Right, it was formerly held indispensably necessary to state an *actual seisin* of the demandant, or his ancestor, *by taking the esplees* or profits of the land. *Co. Litt.* 293, a; 2 *Saund.* 45, a. b. n.

And it is proper, (though perhaps not equally necessary,) to be alledged in a writ of Entry. It is however only descriptive of the *nature* or permanency of the seisin, and therefore not traversable, or necessary to be proved on the trial. 8 *Cran.* 246, *Green vs. Liler*. It seems, indeed, at the present time, to be a formal averment, of the omission of which no advantage could be taken, but by special demurrer. *Ibid.*

Formerly it was usual to state the taking the profits to have been in a *time of peace*. And in the meaning of the ancient law, a time of peace was when the courts of law were open for the administration of justice. When, therefore, (on account of foreign invasion, civil discord, or insurrection against the king's government,) the courts were shut, it was denominated a time of *war*; *quia inter arma silent leges*. A taking the profits, [156] therefore, *tempore belli*, was of no account in the law. *Co. Litt.* 249, b. This phrase, which had its origin in a state of society which does not now exist, is fallen into disuse, and ought at the present day to be wholly omitted.

Seventh. The last circumstance to be noticed here, is the concluding statement of the injury, of which the demandant complains. This, where the seisin *commenced by wrong*, as by disseisin, intrusion, &c. is generally in some measure a repetition of what was before stated in describing the nature of the injury. Thus, where the charge is a disseisin of the *demandant*, either by the tenant or one under whom he claims, the conclusion is concisely, "and the said A. thereof disseised him, and still unjustly withholds the same."

But where the demandant *counts* upon the seisin of the same ancestor, from whom he derives title; after the allegation of the seisin of the ancestor, by taking

the *esplees*, the statement of the disseisin must precede that of the descent of the *right*.

When the demandant claims as nephew, or other collateral heir, and against one who came in by *intrusion*, after the death of tenant for life, it is the usual [157] course to alledge that the ancestor died *without heirs of his body*: and also to state the demandant's *pedigree*, and the descent of the *reversion*; thus, "And from the said J. S. who died without heirs of his body issuing, (or *without issue*,) the right descended to one M., as sister and heir of the said J. S., and from the same M. the right descended to him the said B. who now demands the same, as son and heir of the said M.; and the said A. still unjustly withholds the same." *Rast.* 415, 416.

We shall only add here one further remark, that in all real actions *by the heir*, upon the seisin of his ancestor, it is an established rule, that the demandant must show *how he is heir*. It is not enough to state generally that he is heir: but he must set forth specially in *what manner* he is heir, with accuracy, otherwise it will be bad on demurrer, or judgment by default. 2 *Saund.* 45, a. n.

SECT. V. The real action most common and familiar in our practice, is the *writ of Entry sur disseisin IN THE QUIBUS*; the nature of which has been already explained. *Ante*, § 2. This is the appropriate remedy in all cases of *ouster*, where the action is against the *disseisor*, whether the demandant complains of a disseisin done to his *ancestor* or *predecessor*, or to *himself*. And they are all now limited to thirty years. *Mass. Stat.* 1807, ch. 75, § 1.

[158] I. When the demandant in this writ declares upon a disseisin done to *himself* by the tenant, the form of the *count* or declaration is more simple and

concise than any other real action. And this, we may remember, is the action, which in the old books is generally denominated a writ of Entry IN THE NATURE OF AN ASSIZE. *Reg.* 228, 229; *F. N. B.* 191; *Co. Litt.* 238, b; *Ante* § 2. After describing the premises, the demandant complains that the tenant disseised him thereof, within thirty years last past. He then expressly avers *his own seisin*, in his demesne *as of fee*, or *freehold*, within thirty years, by taking the *esplees* or profits thereof, to some small amount; and concludes with repeating the charge, that the tenant "thereof disseised him, and still unjustly withholds the same." See the form, *Appendix*, No. 1.

As this writ lies for the *freehold* as well as for the *inheritance*, it is the proper remedy, where tenant in *dower*, tenant by the *curtesy*, or any tenant for *life* has been disseised. The only difference in the form of the writ, (when brought by the *disseisee*,) between the action for the recovery of an estate *in fee simple* and an estate *for life*, is in the allegation of the seisin. Where he who demands the *inheritance*, alledges that he was seised *in his demesne as of fee and right*, [159] the averment of tenant by the *curtesy*, or other tenant for *life*, is of a seisin *in his demesne as of freehold*. See the form, *App.* No. 2. And where husband and wife, tenants in *dower*, are demandants, the averment is, that *they* were seised in their demesne *as of freehold, in the right of the wife*. *App.* No. 3, 4.

This distinction as to the form of stating the demandant's seisin, should be *strictly* attended to: for though a mis-statement in this particular might not perhaps occasion a fatal *variance* between the form of the count and the evidence, it would clearly be bad, if shewn for

cause of demurrer. *Saund.* 253, n. 4; *Doug.* 329, *Polyblank vs. Hawkins.*

II. When the writ is brought by the *heir* of the disseisee against the disseisor, it is *strictly* a writ of Entry in the *Quibus*, which (as we have seen,) did not lie at common law, but was given by the statute of Westminster 1st, ch. 47. *Reg.* 229, a; [*Ante*, § 2.] The form, though very simple and concise, differs from the preceding in several particulars.

First. The demandant, after setting forth his demand, and describing the premises, adds the words, "which he claims to be his right and inheritance." This

clause, (which was not usually inserted where [160] the demandant *counted upon his own seisin*,) is called the averment of *title*, or *counting with title*.

And this distinction was formerly observed with great strictness. 3 *Reeves' Hist.* 31. It is conformable to the precedents in the *Register* and *Rastell*: though *Fitzherbert* inserts it in the count upon the *demandant's own seisin* also, where he claims the *fee simple*. *Reg.* 229; *Rast.* 279, 283; *F. N. B.* 191. Perhaps the distinction will not be thought deserving much attention at the present day; but the most approved precedents are clearly against *Fitzherbert*.

Second. The complaint of the demandant in *this case* is, that the tenant *disseised the ancestor* of the demandant, and not the demandant *himself*, as in the preceding case; and then follows the corresponding allegation of the seisin of that ancestor, by taking the profits, and the descent *of the right*, (not of the estate,) to the demandant, as son and heir, or brother and heir, (as the case may be;) and concludes with the usual averment, that the tenant still unjustly withholds the same. *Appen.* 5, 6, 7.

By the law of *England*, it will be recollected this action can be maintained by the heir, *only* when his ancestor has been disseised of an estate in *fee simple*. For the heir in tail takes as a purchaser, and not by descent; and where a person dies seised [161] of an estate *pur auter vie*, it is provided by the English statute of 14 G. II. ch. 20, that it shall be *assets* for the payment of debts, and the residue shall be distributed as *personal estate*. See 2 Bl. Com. 260. But by our statute of descents, (1805, ch. 90, § 1,) estates *pur auter vie*, not devised, descend in the same manner as estates in fee simple. It is manifest therefore, that by our law, the heir whose ancestor has been seised of a freehold of *this* sort, may maintain his writ of Entry for the recovery of it, in the same manner, as for the recovery of a fee simple inheritance. And the only difference in the form of the count will be in the allegation of the seisin of the demandant's ancestor. Instead of the words "in his demesne as of *fee*," must be inserted "in his demesne as of *freehold*, for the term of the life of one W. T. who is yet living." Appen. No. 8.

III. The form of the writ for the *successor* against the disseisor of the *predecessor*, and those who come into the seisin under, or after him, in the *PER*, the *PER* and *CUR*, and the *POST*, very nearly resembles the same writs, when brought in like cases by the *heir*. The principal difference is the substitution of *predecessor* in the place of father, mother, &c. or other ancestor, and *successor* instead of heir; and that the right *came* to the successor, where it is alledged to [162] have *descended* to the heir. See *Appendix No.*

9, 15, 19. This action is the appropriate remedy for a clergyman to recover parsonage lands, of which either he or his predecessor has been disseised. 2 Mass. R.

500, *Weston vs. Hunt*; [7 *Mass. R.* 445, *Inh'ts of Brunswick vs. Dunning & al.*] Still it should be recollected, that where the *predecessor* has been disseised, the *successor* (whose right of entry is not taken away, or barred by lapse of time,) may *enter*, and then bring his writ of Entry upon his own seisin; or he may proceed upon the seisin of his predecessor, at his election. 10 *Mass. R.* 93, *Brown vs. Porter*.

From what has been already said, it is manifest that this writ is the proper remedy for the heir, against *the disseisor of his ancestor*, where the ancestor has been disseised, and dies without having regained the seisin. And in the definition of ancestor, (*antecessor*,) not only his progenitors, as *parents, grandparents, &c.* are included; but all his kindred, collateral as well as lineal, who happen to die before him, and *from whom he can inherit*; as *brother, sister, uncle, aunt, cousin*; and by our statute, (contrary to the rules of the common law,) his *child*, who dies *without issue*.

In all these cases, the important point to be attended to is the correct statement of the demandant's *affinity* to the ancestor, which must always be set forth with accuracy. 2 *Saund.* 45, a. n.

SECT. VI. It may be useful here to remind the student, that although this writ seems adapted by its form to *only one kind of injury*, namely, the *disseisin* of the demandant or his ancestor by the *tenant*; yet this action, (like the action of *Ejectment* in the English courts,) may be resorted to as an effectual remedy, IN EVERY CASE of a *wrongful withholding the demandant's real property, if his right of entry has not been lost, or taken away*. For, as has been already observed at some length, (*Chap. 1, § 12, 13.*) *whenever the demandant can lawfully enter*, the effect of such entry is, to gain at least a

momentary seisin of the estate. If, therefore, the wrongdoer, after the lawful entry of the owner, still withholds the possession from him, such wrongful withholding is *in law a re-disseisin*. [2 *Prest. Abst.* 292.] And upon *such disseisin* the owner may maintain his *writ of Entry in the Quibus*, setting forth the injury of which he complains, precisely in the same manner as if he had been *actually disseised* by the tenant, when in the quiet and exclusive possession of the property. The principal difference, therefore, between the action of *Ejectment* and the *first* kind of writ of *Entry in the Quibus*, (in their application to those cases, where there [164] is a right of entry, but no actual seisin,) is, that in order to maintain the writ of Entry, an *actual entry* must be first made: while the necessity of an actual entry in the Ejectment is superseded by the *confession of an entry*, in the "consent rule," as it is called. For the *confession* in that action is *equivalent to an actual entry*. In every case, therefore, where the action of Ejectment might be maintained, according to the practice of the courts in *England*, and in the state of *New York*, the demandant, *according to our practice*, may first make an *actual entry*, and then prosecute his writ of *Entry in the Quibus*. And this course is frequently adopted in practice; though the demandant always has his election, (where he can lawfully enter,) either to make an entry, and then pursue his remedy *by this writ*; or to proceed by *such other* writ of Entry as is adapted to the injury of which he complains, and which *does not require* any previous entry to be made, in order to enable him to maintain it. It may perhaps be useful to the student to illustrate these remarks by a few examples.

First. If the father or other ancestor of the demandant has been disseised, and has died without re-

gaining the seisin, and the disseisor has died within less than five years after the disseisin, the demandant may prosecute against the heir of the disseisor, his [165] writ of *Entry sur disseisin* in the PER, which is the appropriate remedy where the estate has passed by descent from the disseisor to his heir. And in order to maintain *this action*, no previous entry need be made. But as the entry of the demandant is not in this case taken away, by the disseisin done to his ancestor, and the descent cast upon the heir of the disseisor, (the disseisor not having been seised five years before his death,) the demandant may elect to make an *actual entry*, and then bring his writ of *Entry in the Quibus*, instead of his *Entry sur disseisin in the PER*. And if the disseisin has been done to the demandant himself, instead of his ancestor, within twenty years, and the estate has descended, (as in the former case,) to the heir of the disseisor, in this case also the demandant may elect, as before, to sue his writ of *Entry sur disseisin in the PER*, or to make an entry, and then bring his writ of *Entry in the Quibus*, charging the tenant as disseisor, in the manner before stated.

So, also, if there have been *two* or more descents after the disseisin, in which case the proper remedy of the demandant would be a writ of *Entry sur disseisin* in the PER and CUI, or in the POST; still, if his right of entry remains, he may in these, as in the other cases, make an actual entry and then prosecute his writ of *Entry in the Quibus*, instead of the other writs just mentioned.

[166] The same principles apply to the relations of *predecessor* and *successor*, as to ancestor and heir; particularly in the case of Ministers of parishes and Rectors of churches, who may prosecute their writs

of Entry in the *PER*, the *PER* and *CUI*, or the *POST*, upon the seisin of their predecessors, where their right of entry is not taken away; or may make an actual entry, and having thus regained a sufficient seisin for that purpose, may bring their writ of Entry upon their own seisin. 2 *Mass. R.* 502, 503, *Weston vs. Hunt*; [7 *Mass. R.* 445.]

Second. In like manner, where tenants by the *curtesy*, or tenants in *dower* have aliened their estates *in fee* or *for the life of another*, and after their death, the alienees or their heirs or assigns hold over, in these cases the appropriate remedy for the reversioner is by writ of *Entry ad communem legem*. *F. N. B.* 207; *Booth*, 190.

But the right of the reversioner to enter in these cases, is not taken away. He therefore may, if he please, make an actual entry, as before mentioned, and then resort to the usual remedy upon his own seisin, by writ of Entry in the *Quibus*; or he may proceed by writ of Entry at the *common law*, in the *PER*, the *PER* and *CUI*, or the *POST*, according to the circumstances of his case.

So, also, in the *ancient law*, if husband seised [167] in right of his wife made a feoffment of her estate in fee, the estate was said to be *discontinued*, so that she could not enter, if she survived him. Her only remedy, in this case, to recover the land after the husband's death, was the writ of *Cui in vita*; or, if she had been divorced from him, a *Cui ante divortium*. *Reg.* 232, 233. But since the statute 32 *H. VIII.* ch. 28, this effect of the husband's conveyance is taken away, and the wife may now enter after his death, or a divorce from him, and then proceed by writ of Entry in the *Quibus*, as before mentioned. This is indeed the

usual course ; and the ancient writs above named have seldom, if ever, been resorted to in our practice.

In the like manner, if a *Minister* alien parsonage lands, without the assent of the parish, or a *Rector* without the vestry, it will be valid *only during their ministry*. And it is no *discontinuance*, so as to take away the entry of the successor. He may enter, and, if necessary, he may afterwards maintain an action upon his own seisin. 2 *Mass. R.* 502, *Weston vs. Hunt*.

Third. We shall here mention only one more class of cases, to illustrate the preceding remark, as to the extent of the application of the remedy by writ of Entry in the *Quibus*.

[168] The student will recollect, that when any tenant for life dies seised of lands, and after his death a stranger enters thereon, before any entry by him who is entitled to the remainder or reversion, this injury is denominated an *intrusion* ; and the appropriate remedy is by the writ of *Intrusion*, which may be brought in any of the degrees, according to the circumstances of the demandant's case. *Reg.* 233 ; *Rast.* 415 ; *See Appen. No.* 26, 27, 28, 29. But such entry by the intruder does not deprive either remainder-man or reversioner of *his* right of Entry. They therefore are not *confined* to the remedy by writ of *Intrusion*, but may first make an actual entry, as in the cases before mentioned, and then sue their writ of Entry in the *Quibus*.

And lastly, where the ancestor having died seised, a stranger enters before the heir, (which it will be remembered, constitutes an *abatement*,) the ancient remedial writ for this injury was an *Assize of Mort d'ancestor*. *Reg.* 223, b ; *Rast.* 235, b ; *Booth*, 206 ; and *see ante*, § 2, p. 128. [*App. No.* 25.] But here also, as in the

preceding cases, the demandant's right of entry remains, of which he may, and in our own practice, perhaps *always* does avail himself; and then sues his writ of Entry in the *Quibus*.

The same remarks might be extended to the ancient writs of *Entry ad terminum qui præterit*; [169] (*F. N. B.* 201; *Rast.* 25 b.) *Dum non fuit compos mentis*; (*F. N. B.* 202; *Rast.* 249, b.) and *Dum fuit infra ætatem*, when brought by the heir. *F. N. B.* 192; *Rast.* 249. b. In all cases of this sort, however, it should be remembered that the entry must be made *within twenty years* from the time the demandant's right accrued, to avoid the statute of limitations. [*Ante, Introduct.* § 19.]

SECT. VII. The next case which claims our attention, is where the disseisor has made a conveyance in fee, in tail, or for life; or where the disseisor having died seised, his heir has entered, claiming the estate by descent. In each of these cases, a different form of writ from the preceding is required, called a writ of Entry in the *PER*, because it names the person *by* whom the tenant came into the seisin. And this, according to *Finch*, *Coke*, and *Blackstone*, makes the first degree. *Finch*, 90, b; *Co. 2 Inst.* 153; 3 *Bl. Com.* 181. But *Booth* and *Reeves*, after *Fleta*, consider the original disseisor as the first degree, and this the second. *Booth*, 172; 1 *Reeves' Hist.* 397; *Fleta*, lib. 5, c. 35, p. 360.

It may be useful here to observe, that to make a degree in the title to a freehold, there must be a *transfer of the seisin* from one person to another, either by *act of law*, as a *descent*, or by act of *him who is in* [170] *the seisin*, as by *lawful conveyance*. But no estate gained by *wrong* makes a degree. [*Co. Litt.* 239, a.] In all these cases, the party is said to be, or come in,

beyond the degrees, that is, *in the post*. So also the estate of *tenant by the curtesy*, of the *lord by escheat*, and a conveyance under the *statute of uses*, or by *judgment* or *recovery*, are all in the *post*, and do not make a degree. But tenancy in dower, by the assignment of the *heir*, is otherwise. The wife in that case is in the *PER*, that is, *by* the husband. Yet if a *disseisor* assign dower, this makes no degree, but the wife is in the *post*. *Co. 2 Inst.* 153; *Co. Litt.* 239, a.

It is proper to add here this further remark, that even when the degrees are past, if the estate *comes back again* to the heir or assignee of the disseisor, the degrees are thereby *restored*, and he is now in the *PER*, as before. *Co. Litt.* 238, b. 239 a.

A writ of Entry in the *PER* may be brought, *First*, By the disseisee; *Second*, By the heir; or *Third*, By the successor of the disseisee, and by them only.

I. When the *disseisee* is demandant, after the statement of his claim, and the description of the premises, (which are the same as in the preceding writs of [171] Entry in the *Quibus*,) the demandant, instead of stating that the tenant "thereof disseised him," avers that the tenant hath *no entry* into the premises, but *by* the disseisor, who demised them to the tenant, and thereof disseised the demandant. Then follows the statement of the demandant's seisin by the taking of *esplees*, (as in other cases,) the disseisin and demise to the tenant by the disseisor, with the usual conclusion, that the tenant still unjustly withholds the same. *App. No.* 10. If the demandant claims only *an estate for life*, instead of the *fee simple*, no other change is required than merely the insertion of the words "as of freehold," by way of substitute for the words "as of fee and right" in the allegation of the seisin. *App. No.* 11.

When the action is brought by a corporation, the form is the same as for an individual, except only the substitution of the name of incorporation. *App. No. 12.*

II. When this writ is brought by an *heir*, the chief variance in form from the preceding case, where the *disseisee* is demandant, is the change of "the said B." (the demandant,) to "*J. S. father, brother, or son of the said B., whose heir he is ;*" and adding, after the description of the premises, the clause of title, "which he claims to be his right and inheritance ;" and also the allegation of the descent of the *right* from the demandant's ancestor, as in the writ of Entry in the *Quibus*, by the heir of the disseisee. *App. No. 13.*

III. As to writs of Entry in the *PER*, by the [172] *successor*, upon the seisin of the *predecessor*, it seems sufficient merely to remark, that they differ from the like writs, when brought by the heir, upon the seisin of his *ancestor*, in the same manner which has been already noticed in relation to writs of Entry in the *Quibus*. In practice, however, they are seldom brought, when the demandant can lawfully enter, and sue upon his own seisin.

SECT. VIII. The writ of Entry in the *PER* and *CUI*, the student will recollect, is the remedy when the tenant, against whom the action is brought, is removed one step farther from the party who committed the original wrong : as where there have been two conveyances or two descents ; or one descent and one conveyance, since the disseisin. This, like the preceding writs, can be maintained *only by the person disseised, or by his heir or successor*. In both cases it differs from the writ of Entry in the *PER*, (when brought by the same party,) only in the statement of the manner of the tenant's entry, and in the charge of the injury with which the

count concludes. As to the *entry*, where the writ in the *PER* states it to be "by J. N. who demised the same to him, and thereof disseised the demandant," the other is "by one F. *to whom* J. N. demised it, who [173] thereof unjustly disseised the demandant." And the concluding charge is, "that J. N., the disseisor, demised to F., by whom the tenant entered, and still unjustly withholds the same." But when brought by the *heir*, the statement of *title*, the descent of the *right*, and the demandant's *affinity* to the ancestor, are the same as in the other writs of Entry. *App. No.* 16, 17, 18, 19.

"These degrees in writs of Entry," says lord *Coke*, "are necessary to be observed, or else the writ is abatable; for *sicut natura non facit saltum, ita nec lex.*" *Co. Litt.* 238.

SECT. IX. When there have been *more than two* descents or two conveyances, after the disseisin, the *degrees* are said to be *past*; and the remedy is by the writ of Entry in the *post*. This writ, like the preceding, may be maintained by the disseisee, or by his heir or successor.

The writ of Entry in the *post*, *after the degrees*, that is, after *more than two* descents or conveyances, was given by the *statute* of *Marlbridge*, ch. 30. 52 H. III. Before that statute, there was a writ of Entry in the *post*, where one entered by *disseisin, intrusion, abatement, judgment, succession*, or as tenant by the *curtesy*.

But where there had been *more than two alienations* [174] *or descents*, after the first wrong, no writ of

Entry could be maintained at the common law; the only remedy before that statute was by writ of *Right*. *Co. 2 Inst.* 153; *Finch* 90.

In the time of *Bracton*, and long after, it seems to have been usual to insert in writs of Entry in the *post*, the following clause, viz. *et unde queritur quod predictus A. ei deforciat*. But when the writ was in the *PER*, or *PER* and *CUI*, it was always omitted. 3 *Reeves' Hist.* 31. In modern practice, or at least in ours, this clause has generally been omitted. It seems proper, however, to retain at least the *latter member of it*, in the concluding part of the count.

The writ of Entry *sur disseisin* in the *post*, whether brought upon the seisin of the *demandant* or his *ancestor* or *predecessor*, very nearly resembles the writ of Entry in the *PER*, already mentioned. The points in which it varies from that writ, are the statement of the tenant's entry, in the preceding and concluding part of the count, and the averment at the close, that he *deforced the tenant thereof*, before the concluding words, "and still unjustly withholds the same." *App. No.* 20, 21, 22, 23.

It is manifest that this writ may be brought by any *tenant for life*, upon his own seisin, as well as by the *owner of the fee*. But upon the seisin of the *demandant's ancestor*, it is equally clear, that it can be maintained, only when that ancestor has been [175] disseised of an estate in *fee simple*, or a freehold *pur autre vie*.

The writ of *Entry sur disseisin* in the *post*, upon the *demandant's own seisin*, is the process generally adopted in suffering a *common Recovery*. The reason for preferring this, to other writs of Entry, for the purpose of suffering a recovery, originally was, that the tenant in *this* writ might vouch *at large*, and was not bound to vouch *within the degrees*; as he was in writs of Entry in the *PER*, and the *PER* and *CUI*. It was safer, therefore, for the purchaser, since no writ of error could be

brought in this case, for wrong or illegal vouchers; as there might be when the other writs were used, and the *person vouched was not within the degrees*. *Co. 2 Inst.* 154, 243; *Booth*, 176.

In our own practice, the writ of Entry in the *POST*, is more frequently brought than any other, with the exception only of the writ of Entry in the *Quibus*, already so fully noticed. *Ante*, § 5, 6. For, as was before observed, *it is not confined* to cases where there have been more than two descents or two alienations. It lies in all cases where the tenant comes in, *after* the disseisor, by abatement, intrusion, disseisin upon disseisin, or by judgment or escheat. And if a *woman* commit a disseisin, and afterwards take husband and die, and [176] the husband claim to be in, as tenant by the curtesy, he is in the *POST*. But the wife of the disseisor who is in, claiming as tenant in dower, is in the *PER*, that is, *by* her husband. *Co. Litt.* 239, a. Still it is to be remembered, as was before remarked, that where the *degrees are past*, so that the proper remedy would be a writ of Entry in the *POST*, if by a further conveyance, the estate should come *back again*, and vest in the feoffee or lessee of the disseisor, the law will consider him as in of his *former* seisin, and the writ against him must now be in the *PER*. *Co. Litt.* 239, a.

SECT. X. We are next to notice the remedies for another class of injuries, (analogous to a disseisin,) which in the law are denominated *abatement* and *intrusion*; the nature of which has been already explained. *Chap.* 1, § 1.

1. Where the injury complained of was an *abatement*, the ancient law, in its great refinement, had provided several remedies, according to the characters of those

from whom the estate came, or by whom the abatement was made.

Thus if the demandant claimed the estate as next heir to his father, mother, brother, sister, uncle, aunt, nephew, or neice, who had died seised in his demesne as of fee, (and the tenant was not co-heir of the same ancestor,) the remedy was by *Assize of Mort d'ancestor*. If the ancestor from whom he [177] claimed was the grandfather, great grandfather, or some collateral cousin, the remedy was by *writ of Ayel, Besayel, or Cousinage*. In these writs the only points of inquiry were, whether the ancestor was *seised on the day of his death*, and whether the demandant was his *next heir*. There is, however, some difference in point of form; the *ancestrel writs* expressly *alleging title* in the demandant, while the *assize* merely prays an *inquiry* may be made.

If the abatement was by a coparcener, a *still different remedy* was provided, called from the principal words in the writ, a *Nuper obiit*; (Reg. 226; Rast. 240,) and in some cases a writ of Right *De rationabili parte*. Reg. 3; Rast. 541.

Where lands were *devisable by custom*, it was held, even in the time of *Bracton*, that an *Assize of Mort d'ancestor*, and the writs of *Ayel, Besayel, and Cousinage*, did not lie. For although the ancestor died seised, it would not *certainly* follow that the heir was entitled to recover, because the ancestor *might have devised* the lands. And it seems that immediately after the statute of wills, (32 H. VIII. ch. 1,) had made all socage lands *devisable*, these writs fell into disuse. See 1 Leon. 267. It appears not to have been thought allowable, or perhaps practicable, to alter the *ancient form* [178] of either of them, by adding an averment that

the ancestor *died intestate*, or *without having devised* the lands in question, so as to accommodate them to the change which that statute had made in the law. They were accordingly all given up; and as the *right of entry* by the heir was not, in any of these cases, *taken away* by the abatement, his course was, to make an *actual entry*, and bring his writ in the *Quibus*, until real actions became obsolete; after which he resorted to the remedy by writ of *Ejectione firmæ*, as a substitute. *Booth*, 204.

In the *Colony of Massachusetts* a different course seems to have been pursued, even at an early period. The founders of our judicial institutions, (whatever may be thought of them in other respects,) certainly were not *bigoted to legal forms*. They had no scruples about altering the venerable precedents of antiquity, even without the sanction of legislative authority, where they could be better adapted to their circumstances and wants. Many changes were made by them, in the forms of writs and other process. Among other examples of this sort, is the writ that has long been in use in our practice, in which the demandant alleges the seisin

of his ancestor in fee, and that he died so seised, [179] *and intestate*, and that after his death, the tenant,

(or some one under whom the tenant claims,) entered and deforced the demandant. *See Am. Precedents of Declarations*, 362. 3d Ed. This writ, (which is not strictly a writ of Entry,) is different from any precedent to be found in the Register, or other *judicial repertorium*; but it nearly resembles the *ancestral* writs above mentioned, (*Rast.* 28, 29.) with the exception of the averment that the ancestor died *intestate*. *App. No.* 25.

In practice this writ is seldom resorted to; it being the more usual, and perhaps the better course, for the

demandant to make an actual entry, and then to bring his writ of Entry in the *Quibus*, as formerly stated. It may be remarked, however, that there seems to be no objection on legal principles, to the form or substance of this writ. And as it was formerly considerably in use, it was deemed proper to notice it here.

2. The writ of Entry upon an *Intrusion*, (of which it remains to add one or two remarks,) may be brought by him who has the *reversion*, or the *remainder* in fee simple or for life, as *heir*, *assignee*, or *lessor* for life of another, *after the death* of tenant in *dower*, tenant by the *curtesy*, or other tenant *for life*. It cannot be maintained by tenant *in tail*, his remedy being by *Formedon*; nor by him who has only a remainder [180] or reversion for *years*, because he has not the *freehold*. [*Booth*, 181.] There is nothing peculiar to this writ, however, which seems to require notice. It must be grounded on an intrusion after the death of a person who was merely a *tenant for life*, and not after the death of a tenant in tail; nor even of a tenant in tail after possibility of issue extinct. *F. N. B.* 509; 8 *Co.* 172, b; *Booth*, 185; 11 *Co.* 80, *Bowle's case*. In its form it will be seen that it is somewhat longer, and in some respects, different from writs of Entry *sur disseisin*. It may be brought against the *Intruder*, or those who come into the seisin under him, in the *PER*, the *PER* and *CUI*, and in the *POST*. *App. No.* 26, 27, 28, 29. *Booth*, 183. But it is one of those writs which are not frequently brought at the present day, where the demandant *can lawfully enter*, so as to maintain his writ of Entry in the *Quibus*.

[There was another sort of intrusion, where a person entered unlawfully upon the possession of the king. For that act, which as to a subject would be deemed a

disseisin, was denominated an *intrusion*, as to the king ; it being considered that the seisin still continued in him, notwithstanding the wrongful entry, as he was incapable of being disseised. *Co. Litt.* 277, b. And the maxim that the *king* cannot be disseised, we have adopted and applied to the *state*. 6 *Pick.* 409, *Ward vs. Bartholomew.*]

SECT. XI. In the preceding part of this chapter, the nature and form of those writs of Entry, which may be maintained by the demandant, where the seisin of the tenant *originally commenced by wrong*, have been examined at considerable length. As these constitute the usual remedies by writs of Entry adopted in our practice, there will be occasion for but few remarks on the other class of writs before referred to, (*Ante.* § 2, pt. 2,) where the seisin of the tenant is *not* alleged to have *commenced by wrong* ; but the injury consists in a *wrongful withholding the seisin* from the demandant, after the estate of the tenant *has expired* by lapse of time, or *been otherwise determined*, or where the title was *originally defective*.

[181] I. Of the writs which lie for the recovery of lands, where the estate of the tenant *commenced rightfully*, it will be sufficient to notice three ; though there were in early times some others which might be regarded as belonging to the same class. As to these writs, it is proper to remark a distinction ; the two first being grounded upon the *determination of the particular estate*, under which the tenant held, and the third upon the *breach of a condition*.

1. The first is the writ of *Entry ad communem legem*, which might be brought by him who *had the reversion*, after the death of tenant in *dower*, tenant by the *curtesy*, or any tenant *for life* ; where such tenant *had aliened*

in fee, in tail, or *pur auter vie*. *Reg.* 224 ; *Booth*, 190 ; *Finch*, 91, b. It was called a writ of Entry at the *common law*, to distinguish it from a similar writ, which was given in some other cases, by the statute of Westminster 2, ch. 3. *Co. 2 Inst.* 346.

This writ lies against the *grantee* of any tenant for life, or his assignee ; and in each case, it very nearly resembles the writ of *Intrusion* before noticed, against an intruder, after the death of the same tenant. Like all other cases of *this class* of writs, it is only in the *PER*, the *PER* and *CUI*, and the *POST*, and not against the *original party*, because *he* does not come in by *wrong*. *App. No.* 30.

2. Another writ, very similar to the last, is [182] denominated a writ of *Entry ad terminum qui præterit*, from its containing these words in the ancient form. *Finch*, 92, a ; *Booth*, 172 ; *Reg.* 227 ; *F. N. B.* 201. This writ may be brought *after the expiration of the lease*, by the *lessor*, or by his *heir*, to whom the reversion has descended, or by the *assignee* to whom it has been assigned. And it lies against the *lessee for life*, or for *years*, or a *stranger*, to whom the lessee has assigned, if such tenant or assignee *hold over*, after the expiration of his term ; in which case he is denominated *tenant at sufferance*. But it does not lie after the death of tenant in *dower*, or by the *curtesy* ; for their estate is not properly called a *term*. *Reg.* 227, 228 ; *Finch*, 92. In the ancient precedents of this action, there is a *minute peculiarity*, which is noticed in the *Register*, in the writ and count ; in both of which, instead of the words "whereupon, he says," *unde dicit*, (as in all other writs of Entry,) the form in this writ is, "whereupon he complains," *unde quæritur*. *Reg.* 228, a ; and see *Appen. No.* 31.

This, like the preceding action, is now become nearly obsolete. And as he who has a freehold in the reversion, may enter upon the tenant at sufferance, [183] the usual course in our practice is for the reversioner, in the case of a lease *for life*, to enter after the expiration of the life estate, and then prosecute his writ of Entry in the *Quibus*. But where the lease is *for years only*, the lessor, or assignee of the reversion, may maintain that action against him, who holds over after the expiration of the term, even *without first making an entry*. 10 *Mass. R.* 263, *Barber vs. Root*.

3. The other writ, before referred to, which was founded upon the breach of a condition, was denominated *Causa Matrimonii prælocuti*; and had its name from the *particular case*, for which it was intended as a remedy. It could be maintained only by a woman who had conveyed lands to a man *in fee*, or *for life*, to the intent that he should marry her; and where he failed to comply with the condition. *Reg.* 233. But as it appears to have become obsolete, even before the time of *Rastell*, no further notice of it seems necessary.

II. Of the other class of writs, before referred to which arise upon the *disability* of the person who made the first estate, two will be briefly noticed. 1. The writ of *Dum non fuit compos mentis*. 2. The writ of *Dum fuit infra ætatem*.

1. The writ of *Dum non fuit compos mentis*, as its name imports, was the remedy provided by the [184] ancient law, for him, who while he was of *non-sane memory*, had aliened his lands in *fee simple*, in *tail*, for *life*, or even for *years*; and was afterwards deforced by the *alienee*, or by any one *claiming under him*. *Reg.* 228, b; *F. N. B.* 202; *Rast.* 248, b. It

might be brought by *the party** who made the alienation, or by *his heir*; and as well against [185] the *alienee*, as his *heir* or *grantee*, in all the degrees.

2. The writ of *Dum fuit infra ætatem* was the ancient remedy for the recovery of lands which had been

* It may appear somewhat remarkable, that notwithstanding the authority of the *Register* and *Britton*, c. 28, fol. 66, supported by *Fitzherbert N. B.* 202, 203, it should have been doubted whether the *grantor* could maintain this action. It is perhaps equally extraordinary, that the manifestly *unreasonable* and *inconvenient doctrine*, should have prevailed so long in the *courts of law* in England, that a person of full age could not be allowed to impeach his own *feoffment or deed*, on the ground of *mental imbecility*. See *Litt.* § 405; *Co. Litt.* 247, a; 4 *Co.* 123, *Beverly's case*. Even in *Chancery* it seems that the same rule is established; and that the party can have no relief upon *his own application*. But after he is found a *lunatic*, by inquisition, his *committee* may avoid his acts, from the time he is found to have been *non compos*. See 1 *Fonbl. Eq.* 47, [5 Ed.] The inconvenience of this doctrine has been strongly felt by the courts of equity. But so anxious have they been to adhere to the rule of law, that they do not allow the *lunatic to be a party* to a suit, for relief from an act, done while he was *non compos*. 1 *Ch. cases*, 112, *Smith's case*. And see 2 *Bl. Com.* 291; *Co. Litt.* 247, a. n. 2; *Fonbl. Eq. ubi sup.*

In *Connecticut*, it has been expressly decided, that the grantor may allege his own mental imbecility in avoidance of his deed. 3 *Day*, 90, *Webster vs. Woodford*. And in our country generally, the principle of the English law, above referred to, is not adopted in its whole extent. The law of *Massachusetts*, like the *Civil law*, extends its protection and control, not only to persons who from *mental incapacity* are deemed incompetent to take care of their property; but to those also, who by their intemperance, and consequent improvidence, might prejudice their own interests, or the interests of their offspring; or bring a charge upon those who are liable for their support. *Stat.* 1783, ch. 38, § 7; 1818, ch. 60. And the legal investigation of the validity of their contracts is usually preceded by the appointment of a *Guardian*, at whose instance those proceedings are had. 16 *Mass. R.* 346, *Somes vs. Skinner*.

aliened by a person *under age*; and it might be brought by him *who made the alienation*, or by *his heir*. *Reg.* 228; *F. N. B.* 192; *Rast.* 248, b. In either case, he could not maintain this action *during infancy*. But an infant who had aliened lands might always *enter during his infancy*, and thereby revest them in himself. And if the lands were aliened by the ancestor, the heir by his entry would be remitted to his ancestor's title. *F. N. B.* 192; *Booth*, 193. This writ, like the preceding, might be brought against the original *alienee*, or those who came in under him in *all the degrees*. *Booth* makes a question, whether he who had aliened his land during infancy could lawfully enter, *after he arrived at full age*, either upon the *heir* or *grantee* of his [186] *alienee*, as *he could upon the alienee himself*. *Booth*, 193. But the doubt does not seem to be well founded. See 3 *Burr.* 1794, *Zouch vs. Parsons*; 8 *Co.* 42, b. *Whittingham's case*.

Where an infant conveyed his lands by *feoffment*, it seems that an *entry* was always necessary to avoid the feoffment. The reason is, that the feoffment was an act of *notoriety* that *operated upon the seisin*; and it was therefore necessary that the act by which it was to be *avoided* should be *equally notorious*. But it seems that where an infant conveys by a deed of *bargain and sale*, or in any other way than by *feoffment*, the conveyance may be *avoided* by an *instrument of equal solemnity*, without an actual entry. And a second deed, made after the grantor attains his full age, may have the double operation of *defeating the first deed*, and also *conveying the estate* to the second grantee. The law does not require idle and useless ceremonies. And it is a general rule, that the disaffirmance of a voidable or revocable act, need only be with the *same solemnity* as the original

transaction. See 14 Johns. 124, *Jackson vs. Burchin*; 11 Johns. 541, *Jackson vs. Carpenter*.

[If a grantee, who is an infant, continue in possession of the land, after his arrival at full age, it will be deemed an affirmance of the contract. And if, without taking *actual* possession, he sell and convey the land to a stranger, it will have the same effect. 1 *Greenl.* 11 *Hubbard & al vs. Cummings.*]

Neither of the three last mentioned writs was probably ever in use in *Massachusetts*. And the [187] two preceding, viz. the writs of *Entry ad communem legem*, and *Entry ad terminum qui præterit*, have become obsolete and unnecessary. Still these old remedies remain a part of our law; and there seems to be no reason to prevent their being maintained at the present day, if any one should see fit to resort to them.

SECT. XII. It remains to add a few remarks upon the writ of *Assize*, formerly alluded to as the supposed invention of *Glanville*, in the reign of Henry II.; and also as having given rise to the distinction so often referred to, between an *actual disseisin*, and a *disseisin by election of the disseisee*. See *Intro.* § 9.

This is not strictly a *real*, but a *mixed action*; in which the disseisee recovered not only the *land* itself, but *damages also* for the injury he had sustained by the disseisin. The *Assize of novel disseisin* was denominated *remedium maxime festinum*, because the tenant was not permitted to avail himself of those dilatory proceedings, which were incident to *real actions*. He could not be *essoined*, nor cast a *protection*, nor *pray in aid of the king*. He was not permitted to *vouch a stranger*, unless he was *present in court*, and ready *instantly* to enter into *warranty*. And besides, the *parol should not demur* in this action, for the *nonage*

[188] of either party. *Co. 2 Inst.* 411 ; 8 *Co.* 50 ;

Booth, 262. The promptness of the proceeding, compared with writs of Entry, led those who had suffered injuries to real property, *not amounting strictly to a disseisin*, to allege that they were disseised, for the sake of availing themselves of this remedy. And during the reign of Edward I., it was extended not only to the recovery of various appendages of the freehold, as *rents, commons*, and the like ; but of *offices, franchises, estovers*, and other profits of lands ; and for the *custody* of woods, parks, &c. all which were claimed, as held *de libero tenemento*. 2 *Reeves' Hist.* 116, 204. It might be brought, not only by him who was seised in *fee simple, fee tail, or for life* ; but tenant by *statute merchant, statute staple, or elegit*, and a *reversioner* whose *tenant had been ousted, a copy holder, or a parson of a church* might also have it. *Booth*, 263. *Exceptions to the writ* were not favoured ; and many which were *fatal in writs of Entry* were disallowed in this. Besides, to prevent the delay incident to pleas in abatement, he who pleaded such a plea, was generally required to *plead over* in bar, or take the general issue, *nul tort, nul disseisin*. *Booth*, 214.

[189] In the reign of Edward III., the proceedings in *Assize of novel disseisin* had departed considerably from their original simplicity. An assize might now be taken in four different manners. 1. *In the point of the assize*, when the recognitors tried the general issue. 2. *Out of the point of the assize*, where the defendant pleaded some special matter in bar, to prevent the assize being taken. 3. It might be taken *for damages*, where the defendant *confessed the ouster*, or some special fact was found against him, whereupon the recognitors were charged only to inquire as to the dam-

ages. 4. The assize might be *taken at large*. This was when, (notwithstanding some *special matter* pleaded by the defendant, as *a deed*,) the recognitors were still directed to try the *title* and *all the circumstances* of the plaintiff's complaint. This last mode of taking the assize, was considered the most liberal and equitable. It was often very strenuously opposed by the defendant; but frequently allowed by the judge; and *always*, as it seems, when the plaintiff was *an infant*.

The great object of the defendant generally being to obtain delay, he often attempted to plead some matter of law, which being proper for the decision of *the court*, and not of *laymen*, would prevent the assize being taken. For though it might be sure eventually to be determined against him; if it *deferred* the taking of the assize, his chief object was attained. The arti- [190]
fice generally practised, was by pleading some matter which admitted a *colourable title* in the plaintiff, manifestly *bad in point of law*; and praying the judgment of the court, whether the assize ought to pass. This was denominated *giving colour*, about which there were many nice distinctions, and much subtile and unprofitable learning. See 3 Reeves' Hist. 22, 24.

In the reign of Richard II., the proceedings by *Forcible entry and detainer*, then introduced, superseded in many cases the *Assize of novel disseisin*, which had greatly degenerated from its original character and design; and instead of deserving the ancient epithet of *festinum remedium*, had become, in consequence of the innovations which had from time to time been made, a tedious and often delusive remedy. At length this action, which had almost entirely superseded writs of Entry, was destined, with them, in its turn, to give place to the action of Ejectment; the history and progress of

which have been already stated at some length. *Chap.* 1, § 3.

SECT. XIII. In remarking upon the several writs of Entry which have been adopted in our practice, it was incidentally mentioned that these writs might be maintained by him who had been disseised of an [191] estate *for life*, as well as where it was a disseisin of the *inheritance*. And it is a general rule, that every person entitled to recover an *estate of freehold* may maintain this action; and that it cannot be maintained for the recovery of any estate *less than a freehold*. There is, however, one case which may appear to be an exception to the universality of this rule. For where the mortgagor, (*after the entry of the mortgagee for condition broken,*) has paid or tendered the amount due to the mortgagee, who still refuses to reconvey, or give up the possession; the mortgagor cannot lawfully *enter*, or maintain his *writ of Entry* for the recovery of the mortgaged premises. His only remedy is by a *Bill in equity*. 3 *Mass. R.* 559, *Hill vs. Payson*; 11 *Mass. R.* 134, *Perkins vs. Pitts*; [17 *Mass. R.* 419, *Parsons vs. Welles*.]

But, as a mortgage conveys only an *estate upon condition*, though the mortgagee has a right to enter immediately, (where there is no *proviso* to the contrary,) still if the money is paid, or the thing stipulated for is done, *according to the terms of the condition*, the estate of the mortgagee is *absolutely determined*: and the mortgagor may immediately *enter*, or resort to his *writ of Entry*. 2 *Mass. R.* 495, *Erskine vs. Townsend*. The distinction between these two cases, the student will [192] perceive, arises from the *breach of the condition* in the *first*, whereby the title of the mortgagee becomes *absolute at law*; and the *performance of it* in

the other. For although an *Equity of redemption* is with us a *legal* estate, (the rights and obligations of mortgagor and mortgagee being strictly defined by statute, and no discretionary power being vested in the courts, so that they can either lengthen or shorten the time of redemption for a moment ;) still we have adopted the *forms of giving relief*, established in the courts of equity; and the mortgagor, *after condition broken*, has no other remedy.

The student is not, however, to understand, from the preceding remarks, that it is necessary *in all cases*, that the demandant, in order to maintain a writ of Entry should have either the *absolute and exclusive dominion* over the property, or an *indefeasible title*. The owner of land over which a *public highway* has been established, or of *flats, navigable at high water*, as he is *seised*, (though subject to the easement or right of the *public*,) may, if he is disseised, maintain his writ of Entry for the recovery of *such land*. 6 *Mass. R.* 454, *Perley vs. Chandler*; [2 *Mass. R.* 127, *Commonwealth vs. Peters*; 4 *Pick. R.* 244, *Miller & al. vs. Miller*.] And where any person is *actually seised* of lands, even *by wrong*, (as where one enters upon the lands of another by *abatement, intrusion, or disseisin*, and claims to hold them *in fee*;) he may maintain a writ of [193] Entry against any one, who enters and obtains the seisin of such lands *without title*. 5 *Mass. R.* 233, *Porter vs. Perkins*; [4 *Pick. R.* 156, *Davis vs. Mason*.]

When the demandant *counts* upon the seisin of his *ancestor* or *predecessor*, he must prove an *actual seisin* within *thirty years*, under our statute of limitation. *Mass. Stat.* 1807, ch. 75. A *clergyman*, therefore, before the *stat.* 1828. ch. 137, could not maintain a writ of Entry, to recover *ministerial* or *church lands*, upon the seisin

of his *predecessor*, where the parish has occupied such lands, with the *consent of the predecessor*, more than *thirty years*. 12 *Mass. R.* 285, *Brown vs. Nye*; [10 *Mass. R.* 93, *Brown vs. Porter*.] But by the *first section* of that statute it is provided that "no writ of Right or writ of Entry, brought by any minister, or other sole corporation, on the seisin of his predecessor, shall be barred by lapse of time, provided the same be brought within ten years after the death, resignation, or removal of such predecessor." If the demandant counts upon *his own seisin*, an *actual seisin* within *thirty years* must be shown, to enable him to recover. A mere *right of Entry*, (which would be sufficient to maintain an *Ejectment*,) will not avail him in a *writ of Entry*, unless there has also been an *actual seisin* by himself, his ancestor or predecessor, within the period before mentioned. In such case, therefore, the party must *first make an entry*, and then he may maintain his writ of Entry *in the Quibus*, upon his own seisin.

If the demandant was disseised more than thirty years before the commencement of his action, he must show an *actual entry* within *twenty years after* such disseisin, and also within *thirty years next* [194] *before* the action was brought, or he cannot prevail. 10 *Mass. R.* 100, *Brown vs. Porter*. Where lands are devised it is a *general rule of law*, that though the *devisor died seised*, the *devisee is not thereupon seised*, until he makes an entry, or some act is done by him, or on his behalf, which has the *effect of an entry*; as where the lands devised are *vacant*, or the person in possession either claims *to hold under the devisee*, or acknowledges *his title*. [*Co Litt.* 111, a; 2 *Sch. & Lef.* 104.] The same principle applied, before the *stat.* 1828, ch. 137, to the *devisee of the remainder*. For although

the remainder-man, who claimed as devisee after the determination of an estate for life, might have his *Formedon in the remainder*, without making any *previous entry*; yet, as he was considered in law a *purchaser*, he was not *actually seised*, upon the *death of the tenant* of the particular estate of freehold, *without an entry*, or some *equivalent act*. If then he elected to take his remedy by *writ of Entry*, instead of a *Formedon* he must have made an entry before he commenced his action; unless it *became unnecessary*, because the possession was vacant, or in a stranger who admitted his title. 4 *Mass. R.* 67, *Wells vs. Price*. By the *second section* of that statute, "in all writs of Entry founded on the seisin of *remainder* or *reversion*, either in the demandant himself, or in his ancestor or predecessor, it shall be sufficient to allege and prove a seisin of the remainder or reversion within thirty years next before the commencement of the action. And the demandant shall not be required to allege or prove an *actual seisin of the land* within that time." See 2 *Prest. Abst.* 354, 355. It is proper here to apprise the student, that when we speak of the *actual seisin* which is necessary to maintain a writ of Entry, it is always to be understood that an actual seisin *by construction of law*, (as before explained,) (*Introd.* § 10,) is just as sufficient to maintain *that, or any other real action*, as an actual seisin *by entry in fact* upon the land. 8 *Cranch*, 246, *Green vs. Lister*.

Where lands are sold for the payment of the debts of the *testator* or *intestate*, by his *executor* or *administrator*, pursuant to a license obtained for that purpose, it is immaterial whether the estate sold is in the possession of the *heir*, or *devisee*, or *their heirs or assigns*. The right to sell is a mere *naked power*, and cannot be

defeated by any alienation, or by obtaining the seisin *wrongfully*, as by *abatement*, *intrusion*, or *disseisin* of the devisee or heir. 4 *Mass. R.* 354, *Drinkwater vs. Drinkwater*. And the purchaser of lands, thus *lawfully sold*, may enter upon them, and then maintain his writ of Entry in the *Quibus*, upon his own seisin, by virtue of the conveyance and entry. 5 *Mass. R.* 241, *Willard vs. Nason*.

[But where lands have been sold by an executor or administrator, under *license from a court*, the heirs at law, creditors, and other persons interested in the estate sold, are not concluded by such sale, unless *every essential requisite and direction of law* respecting the same, has been faithfully complied with;—except after long acquiescence. *Strangers*, however, and all persons who have no privity of estate, or interest to be affected by such sale, are not allowed to question the proceedings of an executor or administrator duly authorised, whose deed, purporting to be made pursuant to such authority, is produced. 7 *Mass. R.* 488, *Knox. vs. Jenks*. And such deed is *admissible* as evidence of the title of the grantee, against the grantor, though not acknowledged or recorded. 4 *Pick. R.* 312, *Pond vs. Wetherbee*. But the lands of a person deceased, of which he was *actually*, and not colourably, disseised, at the time of his death, are not, by the statute, made liable for the payment of his debts. 2 *Greenl.* 312, *Thorndike vs. Barrett*; and see 2 *Pick. R.* 460, *Braman vs. Stiles*.]

The effect upon the seisin, in the case of the levy of an execution, is different. Where an execution is levied upon lands *liable to be taken*, and seisin is given to the creditor in the usual manner, (*Stat.* 1783, *ch.* 57,) by the sheriff,—if the execution is afterwards duly returned and recorded, the creditor becomes thereby *ac-*

actually seised, whoever may be *in possession*. 4 *Mass. R. 954, Drinkwater vs. Drinkwater*. And the seisin acquired by the levy will enable him to maintain a writ of *Entry*, or an *action of trespass*, at his [196] election. 3 *Mass. R. 523, Gore vs. Brazer*; [*ib. 215, Langdon vs. Potter.*] But where the levy is upon land *not belonging* to the *judgment debtor*, or *not liable* to be taken in execution, no *interest* or *seisin* is acquired by the creditor; and both he and the officer become *trespassers* by the levy. *Ibid*; 9 *Mass. R. 96, Bott vs. Burnett*; [7 *Pick. R. 169, Hurd vs. Cushing.*] If the execution is levied upon the *rents and profits* of the estate, for a certain number of years, *instead of the land*; such a levy, being only a *charge* or *incumbrance*, does not *disturb the seisin*, but it still remains in the owner of the freehold, as it was before the levy. 10 *Mass. R. 260, Barber vs. Root*. A party thus levying may have an *action of trespass*, for an injury affecting the rents and profits; but having no seisin of the freehold, he cannot support a writ of *Entry* for recovery of the land.

SECT. XIV. By the ancient law, the right of the heir to succeed to the inheritance of his ancestor, and to stand in his place and feudal relation to the lord of whom he held, was considered an *individual right*. If the tenant left several sons, the eldest inherited alone, to the exclusion of the rest. And where there were only daughters, though they all inherited as co-parceners, still they were considered by the law as constituting together *but one heir*. These principles [197] were adopted as the fundamental *law of descents* in England; and they were finally extended from *lineal heirs* to *collaterals*. Hence it became necessary, where co-parceners sued for their inheritance, that

they should all join in the action. And if by reason of *death, marriage, releasing her right*, or even by *entering upon the estate* while the suit was pending, one of the parceners became disabled, after the commencement of the suit, to proceed in it, the *whole action* might be thereby *abated or defeated*; provided the exception was taken *in season* by a *proper plea*. *Theolo. Dig.* l. 12, c. 1; *Gillb. C. B.* 254.

From the analogy of our law of descents to the case of co-parceners, the same necessity was supposed to exist *here*, for *joining all the heirs*, in an action for the recovery of their *inheritance*. See 7 *Mass. R.* 136, *Daniels vs. Daniels*. To prevent the inconvenience which would result from this liability of the suit to abate, which has been alluded to, where the heirs were numerous, it was first provided by the stat. 1783, ch. 52, and afterwards by stat. 1785, ch. 62, § 3, "that in all actions of *Waste, Ejectment*, or other *real actions*, where possession of the *inheritance*, alleged to have *descended*, is the object of the suit, *all the heirs*, or any *two or more*

of them may *join therein*, or *each one* may [198] prosecute for his particular share of such inheritance." And by the last statute it is further declared, "that the same rule shall extend to *joint tenants*, who are or may be *disseised*. There being now, therefore, no *necessity* for joining *several demandants* in the cases provided for by that statute, it follows, as has been already remarked, (chap. 2, § 6,) that the process of *summons and severance* no longer lies in these cases. The effect of the *legal disability* of one of the demandants, or his *refusal to prosecute*, is not removed by these statutes. [But by a subsequent statute, (1826, ch. 70, § 1,) it is provided that the writ or suit shall not be abated by the death, marriage, or other disability of

the demandant ; and that if a sole demandant die, or be disabled to prosecute the suit, his or her heir, or such other person, as would, in case the action were abated, be entitled to commence the like action, *either alone, or jointly with the former demandant*, may, on motion, be permitted to prosecute the suit. If one or more of several demandants die, or be disabled, the heir or other person interested may prosecute *jointly* with the other demandants, and shall be entitled and subject to costs, as an original party. The court is also required to allow such *amendments* of the pleadings, and *suggestions* on the record, as the case may require. If, therefore, upon the suggestion of the death of one of the demandants, no objection is made to the admission of the person who claims to come in and prosecute, as heir to such deceased party, he will be admitted of course. But if the tenant would deny the death of the demandant, or that the party applying is his heir, it seems he may do so by a *plea*, much in the same manner that the demandant counter-pleaded the *RECERT* in the ancient form of proceedings, mentioned in another place. *See chap. 2. § 7.* It is not likely, however, that many cases will occur, in which these questions may not be settled in a summary way *by the court*, who can admit the heir to come in and prosecute the suit, in no other case, than where he could have commenced *the like action himself.*]

It is still proper to notice one distinction in relation to this subject ; that where the suit is brought by several demandants, and it is *abated* by what is denominated in the law the *ACT OF GOD*, the tenant is not entitled to recover his costs against other demandants. 11 *Mass. R. 56, Cutts vs. Haskins.* But where the suit becomes abated in consequence of the voluntary act of one of

the demandants, as by a *release* of his right, costs are allowed to the tenant. 10 *Mass. R.* 131, *Poor vs. Robinson*; *Ibid* 179, *Oznard vs. Prop. of Lincoln and Kennebeck Purchase*.

With regard to *tenants in common*, the case is [199] different. As they have several freeholds, they were always required in all *real and mixed* actions to sue severally; (*Litt.* § 312,) except only where the thing sued for was *indivisible*, in which case they were permitted to sue together *from necessity*. (*See* 2 *Saund.* 115, *Coryton vs. Lithebye*. But the examples mentioned by lord *Coke*, do not apply to our practice. *Co. Litt.* 195, b; 197, b. [It seems, therefore, that as the *statutes*, 1783, ch. 52, and 1785, ch. 62, did not apply to tenants in common, there was in our law no case in which they could join in a real action, (*unless they claimed by descent*,) until the *statute* of 1828, ch. 137, § 3, which declares, that *joint-tenants, tenants in common*, and *co-parceners*, when disseised, may all join, or any two or more of them *may join* in a suit for the recovery of their right of property or of possession, or any one may sue for his particular share. *See* 1 *Pick. R.* 224, *Rehoboth vs. Hunt*.

But where there is no statutory provision, the rule of the common law, that tenants in common cannot join in a writ of Entry, is so strict, that if *by mistake* they happen to be joined, the court, it seems, will not give leave to amend, by striking out the name of a demandant, which has been erroneously inserted. 2 *Greenl.* 120, *Treat & al. vs. McMahon*.]

It may be proper to add, that if a writ of Entry, or writ of Right is brought *against* several *joint disseisors*, the death of one will not abate the writ; but the demandant may prosecute *against the survivors*. [2 *Pick.*

R. 23, Holmes vs. Holmes & al.] For the *same seisin and disseisin* are still in issue between the parties to the record. [And where an action is brought against husband and wife, who are sued by themselves, or with other tenants; if the husband happen to die, pending the suit, the wife may be proceeded against for the whole.* *Com. Dig. Abatement, (H. 35, 2;)* and see *Cro. Car. 356, Rigley vs. Lee & wife.*] But where there is but one tenant, his death necessarily abates the suit; because neither the *heir*, nor the *executor*, can *defend* in a *real action*, where the tenant dies, pending the suit. 2 *Mass. R. 480, Thomas vs. Smith.* [And see *stat. 1826, ch. 70, § 2, which seems to be in affirmance of the common law.*] 4 *Wheat. 530.*

It is certainly desirable for all the parties, that questions of title to real property should be settled in a *single suit*, instead of subjecting them to the expense of a separate action by each of the heirs, [200] who may be numerous. [And the state of the law upon this subject, (which rendered it proper in the former edition of this work, to caution the young practitioner against joining many demandants in a real action, especially when the time of limitation has nearly expired; lest the abatement of the suit, by the death, or other act of one of the demandants should operate as a perpetual bar,) has been so far altered by the statutes of *Massachusetts, 1826, ch. 70, and 1828, ch. 137,* that the danger and difficulty have been almost entirely removed.]

* If pending a real action, brought by husband and wife, to recover the wife's land, she die, the husband cannot proceed in that action for his estate by the curtesy, by force of the *stat. of Maine, 1822, ch. 186;* but the writ abates. 2 *Greenl. 127, Ryder vs. Robinson.*

SECT. XV. In commencing a real action, (as in most other cases where a party is sued in his own right,) the demandant has his *election* to proceed by *Original summons*, by *Capias*, or by an *Attachment* of the property of the tenant. As no damages are recovered in these actions, it is not very common that a *special attachment of property* is made. But where the demandant has reason to suppose, that when the suit is ended, he may not be able to obtain from the tenant the bill of costs which he may recover; it is prudent and proper to make a special attachment, of sufficient amount to secure a fund for that purpose.

It being provided by the statute of 1795, ch. 75, that if the tenant in a real action is arrested, "his own bond, and no other, shall be required for his appearance to answer to the same;" there can be little or no induce-

ment to commence the suit by issuing a *Capias*.

[201] By another statute (1797, ch. 50, § 4,) relating to the commencement of suits, it is directed, that if the tenant against whom a *writ of Dower*, or other *real action* is brought, is not in *actual possession* or *occupancy* of the lands demanded, the *person in possession* shall be served with a copy of the writ or original summons, or by having it read to him; or the writ shall abate. But the exception must be made by a plea in abatement, and not by motion or suggestion to the court; unless indeed *it should appear* by the return of the officer, that some person was in the *actual possession*, who was not *tenant of the freehold*, and was not served with a copy of the writ. [See Stat. 1828, ch. 137, § 5.]

It frequently happens that a party in possession either by actual *disseisin*, or under a title evidently defective or bad, is disposed to avail himself of his situation, to commit waste upon the land, the possession of which

he does not expect long to retain. In such cases a court of equity would grant an injunction to stop the waste, even *upon a threat*, without waiting to have the injury done. 2 *Atk.* 183, *Gibson vs. Smith*. We have no legal tribunal clothed with this important *preventive power*. By the statute before mentioned, (1795, ch. 75, § 3,) if the tenant, after a real action commenced against him, shall commit *waste* upon the land, [202] he shall forfeit *treble damages*, to be recovered by the demandant, in an action to be commenced *after he has obtained judgment* and possession of the land. This remedy has been found in practice, to be of little use. For it has generally happened, that the party, *thus committing waste*, has either absconded before he could be arrested; or was unable, after judgment obtained against him, to repair the injury he had committed. Perhaps at some future time this subject may be thought deserving of legislative consideration.*

SECT. XVI. As the *demandant* in every writ of Entry must demand a *freehold*, it follows that the *tenant* against whom the action is brought, must be *seised of a freehold*, or the action cannot be maintained against him. But if a writ of entry is brought against one who is not seised of the *freehold*, he can make the objection only by *disclaiming*, or pleading *non-tenure*. *Com. Dig. Abatement* (F. 15.) And if he neglects to plead *that plea*, or pleads the *general issue*, or any *other special plea* in bar; such pleading is an admission of his capacity to defend the suit, as *tenant of the freehold*. 5 *Mass. R.* 352, *Higbee vs. Rice*; 8 *Cranch*, 243, *Green vs. Liter*.

* The defect of the law referred to in the text is now removed by the *Mass. Stat.* 1827, ch. 88.

By the *common law*, it was sufficient if the tenant against whom a writ of Entry was brought, [203] (usually denominated the tenant to the *præcipe*,) was seised of the *freehold in law*, though he might not have the *actual freehold*. *Co. Litt.* 358, b. But by statute 1795 ch. 75, § 2, it is provided, that the tenants in real actions "shall be holden to answer for so much, or such part of the premises demanded, as they then hold, or are in possession of, which they shall distinguish and set forth by their plea, and disclaim in the rest. And if any of them *disclaims in the whole*, and the demandant cannot prove the tenant's possession of the premises, *or any part thereof*, he shall recover his costs." It seems, therefore, that if the ancestor commits a disseisin, and dies seised, and the lands descend to his heir, who refuses to enter, (which is the example of a freehold in law, given by *Littleton*,) (§ 448,) such heir may *disclaim* by force of this statute, and *defeat the action*, to which he would have been liable by the *common law*.

Where there are several tenants, each of whom has disseised the demandant of a *distinct parcel*; or where *one person* having committed a disseisin, conveys *distinct parcels* to two or more persons who hold in *severally*; the tenants cannot be joined in *one writ* of Entry, but must be sued in *separate actions*. And if they are joined, they may abate the demandant's writ. 8 *Cranch*, 243, *Green vs. Lister*; [12 *Mass. R.* [204] 474, *Varnum vs. Abbot*.] On the other hand, if two persons commit a disseisin *jointly*; or if *one disseisor* conveys to *several persons jointly*, they must be all sued in the same action: for in these cases the estate is *joint*, and there is only *one title*. [It is said that a man may be tenant in common by *prescription*,

but he cannot be tenant in common by wrong: for no one can be disseised of an individual *moiety*, unless it be by his co-tenant, who would thereby become seised of the entirety. 2 Salk. 423, *Reading vs. Royston*. *Ld. Raym*, 829, *S. C.* But *quære*; for it seems that if there are two tenants in common, and a stranger enter upon the land, *claiming only a moiety*, and to hold that moiety in common with *one* of the co-tenants, such an entry would be an *actual* disseisin of *the other* tenant; unless the last mentioned tenant remained upon the land; in which case it would only be a disseisin *at his election*.] Neither can the demandant have one writ against several tenants in *different degrees*: as against one in the *PER*, and another in the *PER* and *CUI*, or in the *POST*. But where the action is against two or more *jointly*, a *joint holding*, or a *joint title* is admitted, unless they plead *sole*, or *several tenancy*, or *disclaim* as to *distinct parcels*. 5 *Mass. R.* 352, *Higbee vs. Rice*.

By the *ancient law*, in many cases the plaintiff or demandant was not allowed to *vary the extent of his claim*, by striking out, or abandoning a part of the demand, which he had particularly set forth in his count; which was denominated *abridging his demand*. *Com. D. tit. Abridgement, A. 2.* But the law seems now to be held otherwise, as well here as in *England*. And a party may enter a *nolle prosequi*, as to a *distinct part of the demand*, or as to *one tenant or defendant*, in any stage of the suit. *See the law fully stated in 1 Saund.* 207, n. 2. [*See also 1 Pet. S. C. R.* 74.] So also in a writ of Entry, or other real action, the demandant may, by leave of court, *discontinue*, or enter a [205] *nolle prosequi*, as to *one* of several parcels of land demanded in his writ. 16 *Mass. R.* 348, *Somes vs. Skinner*; [3 *Pet. S. C. R.* 188.]

CHAPTER IV.



PART II.

Pleadings, Evidence, Verdict, and Judgment in writs of Entry.

SECT. XVII. Besides the numerous pleas in **ABATEMENT**, which are alike applicable to almost *all actions*, and of which, therefore, no particular notice need here be taken, there are also *several* which are peculiar to *writs of Entry*, and other real actions. Of these pleas, the most important are 1. *Alienage*. 2. *Non-tenure*. 3. *Joint-tenure*. 4. *Sole-tenure*. 5. *Several-tenure*. 6. *Disclaimer*.

1. In time of *peace*, **ALIENAGE** is no plea in any *personal action*. And even the plea of *alien enemy* in time of *war*, is in that class of actions, only a *temporary disability* of the plaintiff, which ceases with the termination of the war. Its effect is not to *abate* [206] the writ, or to *defeat* the process entirely: but only to *suspend it* during the continuance of hostilities. 11 *Mass. R.* 8, *Levine vs. Taylor*.

It is therefore only to the plea of *Alien friend*, that our attention is now called. This plea can be pleaded only to writs of Entry and other *real actions*; and it may be pleaded in *bar*, as well as in *abatement*. 11 *Mass. R.* 123, *Hutchinson vs. Brock*. For since an alien has not the *capacity of holding* estates of freehold in lands and tenements; he is, *a fortiori*, incapable of maintaining a real action for their recovery.

[But he may defend his title to lands, in a real action, against all persons but the sovereign. 7 *Cranch*, 603, *Fairfax's devisee vs. Hunter's lessee*. And where the legislature, for a valuable consideration, granted land to an alien, his heirs and assigns, with *warranty*; it was held, that upon the death of the grantee, the land descended to his heirs, who were also aliens, and that upon an inquest of office the government was *estopped* to set up the alienage of the grantee, or of his heirs, as the ground of an escheat. 3 *Pick. R.* 224, *Commonwealth vs. Heirs of André & al.* By the common law, an alien may take by purchase, i. e. by grant or devise, but not by descent. In other words, he may take by act of the party, not by act of law. 7 *Cranch*, 603.]

The plea of *alienage* must allege that the demandant was *born out of the allegiance* of the Commonwealth, or that he has been *expatriated* by force of some legitimate act of the government. See *App. No.* 54.

To this plea the demandant may reply, 1. That he has been duly naturalized. And where the plea is that *he was born in England*, he may reply, 2. That although born within the allegiance of the king of *England*, he was an inhabitant of this, or some one of the United States, at the ratification of the treaty of peace of 1783, between the *United States* and *Great Britain*. 3. He may reply in such a manner as to bring his case within the provisions of the *treaty of amity, commerce and navigation*, of 1794, between the two countries. See 9 *Mass. R.* 460, *Ainslie vs. Martin*.

[But *British subjects* born before the revolution, are equally incapable with those born after, of inheriting, or transmitting to others the inheritance of lands in this country. For the treaties of 1783 and 1794, only provide for titles *existing* at the time those treaties were

made, and do not extend to titles subsequently acquired. It is not necessary that the party should have *actual possession* of the property, to give him the benefit of the treaty; but the existence of the *title* at the time is necessary. Therefore where an alien and *British subject* came into the United States subsequent to the treaty of 1783, and before the treaty of 1794, died seised of the lands in question, it was held that the title of his heirs was not protected by the treaties. 7 *Wheat.* 535, 544, *Blights' lessee vs. Rochester*; see 3 *Pet. R.* 99.]

[207] 2. By the ancient practice, the plea of *non-tenure* could be pleaded *only in abatement* of the writ. *Dy.* 210, pl. 27; *Booth*, 179. And the same doctrine, until lately, was sanctioned by our own courts. 8 *Mass. R.* 312, *Hunt vs. Sprague*; 11 *Mass. R.* 216, *Keith vs. Swan*; [see 1 *Greenl. R.* 54; 2 *N. Hamp. R.* 10.] But it has since been determined, upon great consideration, that *non-tenure* may be pleaded in *bar*, as well as in *abatement*. 14 *Mass. R.* 239, *Otis vs. Warren*. [See the late stat. 1828, ch. 13, § 4, at the end of this section, by which important changes are made in the law of pleading, amendments and costs in real actions.]

Non-tenure is either *general* or *special*. In pleading a general plea of *non-tenure*, the tenant merely denies that he is *tenant of the freehold* of the land demanded, or of some parcel of it, which he must particularly describe. *App. No.* 46.

In pleading *special non-tenure*, the tenant not only alleges that he is *not tenant* of the freehold, but sets forth what interest or estate he has, in the lands demanded against him, as that he is tenant for years, or the like; and he also shows *who is tenant of the free-*

hold, under whom he claims to hold the possession. *App. No. 47.* [Where a special plea of non-tenure, alleged that the tenant held under A. who was *seised* of the demanded premises; but without setting forth of *what estate* he was seised; it was lately held, on special demurrer, that the plea was good. 5 *Pick. R.* 238, *Dewey vs. Brown.*]

At the *common law*, if the demandant demanded against any tenant *more land than he held*, the tenant might plead *non-tenure* as to the parcel which he did not hold; and this plea, if true, would abate the *whole writ*. But the statute of 25 *Edw. III.*, ch. [108] 6, (which may be considered a part of *our common law*, it being in force when our ancestors emigrated,) cured this defect, by providing that the writ in such case should only abate *as to the part* whereof non-tenure was pleaded, and either admitted or proved. 8 *Cranch*, 242, *Green vs. Lister*. If the tenant does not hold *any part* of the lands demanded, the writ must of course abate for the whole; according to the remark of *Bracton*, *Amittere non potest quod non habet, et ita cadit breve*. *Brac. l. v. c. 27*, fol. 431, b.

Non-tenure is not restricted to those cases in which the parties to the suit are to be considered as *strangers* to each other. If one *tenant in common* brings a writ of Entry against another, the latter may plead *non-tenure* as to the part of the estate which he does not claim. *App. 48*; 5 *Mass. R.* 344, *Higbee vs. Rice*. Non-tenure may be pleaded in abatement, either with or without a *disclaimer*. 3 *Mass. R.* 312, *Hunt vs. Sprague*. And where there is a plea of *non-tenure and disclaimer*, upon which issue is joined to the country, and *found for the tenant*: or where there is *no finding* upon it, the demandant will not be entitled, under such

a plea, to judgment that he recover his seisin. 10 *Mass. R.* 64, *Porter vs. Rummery*.

[209] Where *non-tenure* is pleaded, the demandant is generally obliged to reply in such a manner, as to *maintain his writ*, by averring that the tenant, on the day of suing forth the demandant's writ, *was tenant* of the freehold, as by the writ is supposed, and concluding to the country. It seems, indeed, that there can be no occasion for any other replication in our practice. *App. No.* 49. [See *stat.* 1828, ch. 137, § 4, *at the end of this section.*]

In the reign of Edward III., and afterwards, it was a common artifice for *disseisors* to attempt to defeat the action of the *disseisee*, by making a *fraudulent feoffment*, in order that they might plead non-tenure, though they still continued to receive the profits of the estate. This gave rise to the statute of 1 *Rich. II.* st. 2, c. 9, which provided that the disseisee should have his remedy and recover the lands against the disseisor, who continued to take the profits, notwithstanding such secret feoffment; *provided* the action was commenced within *one year after the disseisin*. This period being found too short, it was afterwards extended by stat. 4, *H. IV.* c. 7, during the disseisor's life, if he continued to take the profits. 3 *Reeves' Hist.* 173, 275; *Rast.* 276, a.

These were called the statutes of *pernors of profits*, which made no inconsiderable figure in the ancient law, and were often replied to the plea of non-tenure. [210] But their operation was considerably restricted by the statute of uses; and they are perhaps now quite obsolete.

3. JOINT-TENURE is the proper plea, when two or more persons hold *jointly*, and are not all sued: or where a man holds *jointly with his wife*, and he is sued

alone. If the tenants who plead this plea, claim by a joint conveyance, it is usual to plead with a *profert* of the deed. *App. No. 50*. But the *profert* seems unnecessary, because the conveyance is not *traversable*.

This plea seldom occurs in our practice ; because most of those conveyances, as well as devises, which, by the common law, would have created *joint estates*, are, by our statute, (1785, ch. 62,) so construed as to make a *tenancy in common* ; unless the grantees or devisees are *husband and wife*. See 5 *Mass. R.* 521, *Shaw vs. Hearsay* ; 8 *Mass. R.* 274, *Fox vs. Fletcher*. But where two or more are jointly seised, even *by wrong*, as by *abatement*, *intrusion*, or *disseisin*, and are not all sued, this plea may be pleaded by those who are made tenants. And in the case of a seisin obtained by disseisin, or other wrongful act of the tenants, (as they do not claim by descent, but by purchase,) the ancient forms of pleading seem to have required that they should name some *supposed grantor*, under whom they pretended to hold. But no *profert* was made of [211] the supposed deed. They were also required to set forth what estate they claimed, whether in fee simple, in tail, or for life. The supposed grant, thus stated in the plea, was not allowed to be *traversed* ; because the only *material point* in the plea was, whether *another person*, not named in the writ, was seised jointly with the tenants. The demandant, therefore, was obliged in his replication, to *maintain his writ*, by alleging that the tenants held in the manner therein set forth ; *absque hoc*, that the person mentioned in the plea, “now has, or ever had any thing in the tenements, &c. *jointly with the tenants*.” And the replication should conclude to the country. *App. No. 51* ; and see *Rast.* 362, b. pl. 4 ; *Booth*, 31.

Before the statute, *De conjunctim feoffatis*, (34 Edw. I.,) if the tenant pleaded joint-tenure by *deed* or *fine*, the writ was abated, without the demandant being allowed to answer; because he could not aver *sole-tenure* against the *deed* or *record*. But since that statute, he may aver *sole-tenure* against the deed, though not against the fine. *Booth*, 31; *Dy.* 291.

There is also a plea of joint-tenure on the part of the *demandant*. This may be pleaded by the tenant where there are two or more joint-tenants, who have [212] not all joined in bringing the suit. In this case the tenants need not show by whose gift the demandants obtained their title. *Thelo. Dig.* l. 11, c. 27, § 2. The ground of the distinction manifestly is, that the title of the demandants is not presumed to be in the *knowledge* of the tenants. *App. No.* 52.

4. **SOLE, OR ENTIRE-TENURE** is the proper plea, where the writ is against two or more, and only one of them is tenant of the freehold. By the ancient practice, he who pleaded sole-tenure was obliged to *plead over* to the action, or *vouch*. But the demandant, instead of replying to the plea in bar, or to the voucher, was required to *maintain his writ*, by replying that the tenants held jointly, in manner and form as he in his writ had alleged. [*Com. Dig. Abatement* (F. 13.)]

If *one only* of the tenants takes the entire-tenure, and the other makes default, pleads *non-tenure*, or says nothing, the demandant may answer the bar, without maintaining his writ. *App. No.* 53, 54; *Rast.* 276, b; and see *Booth*, 33. If two are sued, and one pleads *non-tenure*, and the other takes the *entire-tenure*, and pleads over in bar, the writ shall abate, only against him who pleads *non-tenure*. *Ib.*

5. SEVERAL-TENURE is much like *sole-tenure*. It may be pleaded where several persons, holding *distinct parcels* of the land by *several titles*, are sued *jointly* for the whole. [*Com. Dig. Abatement*, (F. 12.)

1 *Greenl. R.* 30, *Fosdick vs. Gooding & al.*] In [213] this case each of the tenants may point out the distinct parcel which he holds, and aver that he holds such a part of the tenements *in severally*; denying that the other tenants had any thing therein, on the day of suing forth the writ, or ever after. *App. No.* 55; *Rast.* 365, a.

In this case, as in the preceding, the tenant was required, according to the old precedents, to *plead over in bar* of the action, or *to vouch*. But the demandant, (instead of replying to the bar or voucher, or taking issue, where the general issue was pleaded over in bar,) was obliged by the replication to maintain his writ. *App. No.* 56; *Thelo. Dig.* lib. 11, c. 81, § 20; *Bro. Sev. Ten.* pl. 4, 17, 19.

If, upon pleading this plea, the writ abates, it is not in *part*, as in the former case, but *for the whole*. *Booth*, 34. But where the writ is against *two*, and *one of them pleads several-tenure* as to one parcel, and the other makes default, or gives no answer, it seems the writ shall only abate for the part set forth in the plea. *Thelo. Dig.* lib. 11, c. 31. § 15, 21.

Where the writ is against husband and wife, it is said the husband cannot plead as to part, that he holds in his own right, and as to the residue, in right of his wife. *Ibid.* lib. 11, c. 31, § 12.

6. The plea of *DISCLAIMER* may also be [214] pleaded to *the writ*, though it is not strictly in form a plea in abatement; because, like the plea of *non-tenure*, it does not give the demandant a better writ. But in

our practice it may be pleaded either to the writ, or to the action, at the election of the tenant. *App. No. 53*; see 13 *Mass. R.* 439, *Prescott vs. Hutchinson*. [*Stat.* 1828. ch. 137. § 4.]

7. To a writ of Entry in the *PER*, the *PER* and *CUI*, and the *POST*, the tenant may plead in abatement, that he did not enter *by* or *after* the person alleged in the writ. *App. No. 57*; see *Rast.* 249, a; *Booth*, 179; [*Jacks. R. A.* 122.] [Therefore in a writ of entry counting on a disseisin by the *tenant*, it was held that if he would object that the disseisin was by his *grantor*, under whose deed he entered, the exception should be taken by a plea in abatement. 4 *Greenl.* 20 *Porter vs. Cole*. But see *Mass. Stat.* 1828, ch. 137, § 4, at the end of this section. *Jacks. R. A.* 114.]

8. Where the writ supposes a seisin by a *different ancestor*, from the one who was in fact seised, this, it is said, may be pleaded in abatement. As where the seisin of the demandant's *father* is alleged, instead of that of his *grandfather*, who was the last ancestor seised, and upon whose seisin the demandant should have counted. *Thelo. Dig.* l. 10, c. 27, § 2; *Vin. Ent. G.* 7. pl. 5; *Jacks. R. A.* 112.

But there seems to be little or no inducement to take this exception by a plea in abatement; since the tenant may, if he please, avail himself of it upon the trial, under the general issue. For if the demandant fails to prove the seisin alleged in his count, he must be nonsuited, or have a verdict against him.

[215] Nearly the same remark may be applied to the pleading *Non-tenure* or a *Disclaimer* in abatement. For although this exception cannot, like the preceding, be taken at the trial, under the general

issue; still the tenant may, in our practice, have the same advantage, by *pleading these pleas in bar*, that he would by pleading them in *abatement*.

[By a late statute, (*Mass. stat.* 1828, ch. 137, § 4.) "all pleas which, by the common law, were pleadable to the writ, or to the action of the writ, and which show that the action is misconceived, may be pleaded in *bar*, as well as in *abatement*; but if the tenant prevails in any such plea in *bar*, he shall recover costs only from the time when the plea is filed. And the court may allow amendments of all such mistakes, when the justice of the case shall appear to them to require it, and on such terms as they shall think fit; *provided* that such amendments shall not materially change the nature of the action, nor substitute a new cause of action. And on all pleas of *non-tenure*, *disclaimer*, *several-tenancy*, and *sole-tenancy*, no costs shall be allowed to the party pleading the same, but such as shall accrue after the filing of the plea.]

SECT. XVIII. Besides the preceding pleas in *abatement*, which refer to some *original defect* in the form of the writ, or the situation of the parties, (and to which several others, now nearly, if not quite obsolete, might have been added,) we must also notice a few instances, in which the writ is liable to *abate*, by some occurrence which happens *after the commencement of the suit*. These matters must, of course, be pleaded *PUIS DARREIN CONTINUANCE*; and in several cases the party may wholly lose the benefit of these exceptions, by omitting to plead them *as early as possible*.

1. The first we shall mention is the plea that the demandant has entered upon the lands in question, and disseised the tenant. This, it seems, will *abate* the writ, notwithstanding the demandant may have after-

wards conveyed the lands to *another person*. And where the entry is into a *part only* of the lands in question, the writ shall abate for the whole. *App. No.* 59; *Thelo. Dig.* l. 12, c. 21, § 8; *Vin. Entry* G. 7. pl. 3, 7, 20; [*See Jacks. R. A.* 165.]

[216] The tenant may also plead the entry of the demandant, in abatement, in a different form, as it seems, by alleging that since the last continuance, the demandant disseised the tenant, and is now tenant *himself*. *Thelo. Dig.* l. 12, c. 21, § 11. It should be here remarked, that *an entry which will abate a writ* must be an entry *for the purpose of taking possession*, and not merely a casual going upon the land. *Plowd.* 92; 1 *Bulst.* 9, *The Earl of Shrewsbury's case*. But an entry *after verdict*, though before judgment, does not abate the writ. *Com. D. Abatement*, H. 48; 2 *Brownl.* 231, 235.

2. Formerly, if the demandant, or where the suit was brought by several, one of the demandants, being a *feme sole*, had married pending the writ, it might be pleaded in abatement, *puis darrein continuance*. 10 *Mass. R.* 179, *Oxnard vs. Prop. of Kennebeck Purchase*; *Gillb. Hist. C. P.* 254; *App. No.* 61. But if the tenant omitted to take the exception at the first term after the marriage had taken place, it seems that omission would have been a waiver of it, and he could not plead it afterwards.

[But now, by the *stat.* 1826, ch. 70, it is provided, that the writ shall not abate by the marriage of a *feme sole* demandant; and by a subsequent statute, 1828, ch. 120, it is further provided, that on the marriage of a *feme sole*, after the service of any writ or process in law, in which she shall be plaintiff, demandant, complainant or peti-

tioner, the husband, on motion, may become a party in the prosecution thereof, and the same shall not abate by reason of such marriage.]

3. The tenant might also plead in abatement the death of one of several demandants, pending the writ. *Bro. Brief*, 295 ; *Com. D. Abatement*, H. 35. In this case the writ was *ipso facto* abated, and not merely *abatable*, as in the preceding case ; this plea, therefore, might be pleaded at any subsequent [217] term, and was not restricted to the first term after the death of the party. The conclusion of this plea should not be by praying judgment of the writ, *et quod breve cassetur* ; but it should pray judgment, *si Curia ulterius velit procedere*, *Com. D. Abatement*, H. 33 ; *App.* 62. It is not usual in our practice to plead in abatement in cases of this kind. The common course is to *dismiss* the action upon the suggestion of the death of a demandant ; the tenant in such case not being entitled to costs. 11 *Mass. R.* 56, *Cutts vs. Haskins*.

[But in a writ of Entry by husband and wife, *in right of the wife*, the court refused to dismiss the action, upon the suggestion, by the tenants, of the death of the husband *puis darrein continuance*, *Brown & ux. & al. vs. Inh'ts of Marlborough*, S. J. Court, Middlesex, Oct. T. 1825. The law of *Massachusetts* is now changed by *stat.* 1826, ch. 70, § 1, which declares that suits for the recovery of lands, &c., shall not be abated by the death, or other disability of the demandant ; but if a sole demandant die, or be disabled to prosecute the suit, the heir or person who would, in case the action were abated, be entitled to commence the like action, either alone, or jointly with the former demandant, may, on motion, be permitted to prosecute the suit accordingly. And if one or more of several demandants die, or be disabled

as aforesaid, the heir or other person interested as aforesaid, may, on motion, be permitted to prosecute the suit jointly with the other demandants; and if, in the latter case, there shall be no motion to be admitted as aforesaid, at the term next after the happening of such death or disability, or within such further time as the court shall order, then the other demandant or demandants shall be allowed to prosecute the suit for so much, or such part of the premises, as may then belong to them. And the heir or other person, so permitted to prosecute, shall be entitled and subject to costs, as if they had been original parties to such suit.

As the heir or other person interested can be admitted to prosecute, only when he would have been entitled to commence the *like action himself*; it seems to follow, that where the action is a writ of entry by tenant in tail, or tenant for life, or a disseisin to himself, neither the heir in tail, nor the remainder-man or reversioner, can be admitted to prosecute, because their remedy would be by a *different action*.]

To all these pleas in abatement, if the demandant does not demur, he is generally obliged to reply in such a manner as to maintain his writ: since, with the exception of the case already mentioned, of the replication to a plea of *non-tenure*, "that the tenant fraudulently made a feoffment, and continued to take the profits," there is perhaps scarcely any case, in which either of the pleas in abatement that have been mentioned, could be avoided by the replication.

It is remarked by Serjeant *Williams* in his notes on *Saunders*, (2 *Saund.* 44, n. 4,) that a plea of non-tenure, though it prays judgment of the writ, is not strictly a plea in abatement: for, instead of giving the de-
[218] mandant a better writ, it shows that the tenant

is not liable to the action in any shape. This remark applies with great force to the *general plea* of non-tenure: but the *special plea* of non-tenure is, in form, strictly a plea in abatement. It expressly informs the demandant, against whom his action should be brought. It seems, however, according to the case of *Keith vs. Swan*, (11 *Mass. R.* 216,) that in a writ of entry, brought to foreclose a mortgage, such a plea in abatement would be disallowed. The reason assigned is, that it is a proceeding founded upon statute, and does not decide the *right* to the freehold. And any person in possession of the mortgaged premises is liable to the action of the mortgagee, unless he claims by title paramount to that of the mortgagor.

Pleas in abatement to real actions are not common in our practice; partly, perhaps, on account of their being discountenanced by the courts; but chiefly because such pleas were required by the statute of 1782, c. 11, § 6, to be filed in the *Common Pleas*, before the jury was impannelled. And besides, the two pleas in abatement which were formerly in most common use, *Non-tenure* and *Disclaimer*, may now be pleaded in bar. 14 *Mass. R.* 240, *Otis vs. Warren*; 13 *Mass. R.* 439, *Prescott vs. Hutchinson*. [It may be added, that the late statute, 1828, ch. 137, which allows all pleas that "by the *common law* were pleadable to the writ, or to the action of the writ, or which show that the action is misconceived," to be pleaded in *bar*, as well as in abatement, will still further diminish the occasion for these proceedings.] It is proper to observe, that the provision of the statute, respecting the filing [219] of pleas in abatement, was confined to actions originally entered in the *Court of Common Pleas*, and did not extend to actions in the *Supreme Judicial Court*;

but a plea in abatement in that court might always have been filed at any time before imparlance. 9 *Mass. R.* 217, *Campbell vs. Stiles*. By the statute of 1811, c. 33, the county courts of *Common Pleas* were succeeded by the *Circuit Courts of Common Pleas*; and these again, in their turn, by the present court of *Common Pleas*, by the statute of 1820, c. 79. No particular direction respecting the filing of pleas in abatement is contained in either of the two last mentioned statutes; but they both give the respective courts a *general authority* to make such rules *for the filing of pleas in abatement and demurrers to declarations*, as might be thought proper. It seems, therefore, that the provisions of the statute of 1782, were repealed by that of 1811; and consequently, that the time for the filing of pleas in abatement in the *Common Pleas*, (until the court shall establish a different rule,) is the same as in the Supreme Judicial Court; that is, at any time before a *general imparlance*.

[It is now provided by rule 36, that pleas in abatement and demurrers to declarations may be filed, at any time during the *first four days* of the return term, and not afterward. But where an action was continued at the return term, pursuant to the stat. 1797, ch. 50, § 3, on the suggestion of the defendant's absence from the commonwealth; and on the first day of the next term, the defendant appeared, and offered a plea in abatement, which was rejected by the Court of Common Pleas, on the ground that it was not filed according to the rule,—it was held by the Supreme Court that the rule was not applicable to the case, and that the plea ought to have been received. 4 *Pick. R.* 89, *Rathbone vs. Rathbone*. And see 3 *Pick. R.* 512, *Thompson vs. Hatch*.]

SECT. XIX. PLEAS IN BAR are much less numerous in real than in personal actions. In writs of Entry,

there are but few special pleas which require [220] particular notice; because a large proportion of the trials in this action are had under the *general issue*, *NON DISSEISIVIT*. This plea is nearly the same in all writs of Entry. The only difference is, that in writs of Entry *in the Quibus*, the tenant pleads that *he* did not disseise the demandant (*or his ancestor*,) and in the other writs he denies the disseisin by the person named as *disseisor* in the count. *App. No. 63, 64, 65.*

2. *NON-TENURE*; it has been already stated, (*Ante*, p. 180,) may be pleaded *in bar*, as well as in abatement; though the contrary doctrine formerly prevailed. 14 *Mass. R.* 239, *Otis vs. Warren*; 11 *Mass. R.* 216, *Keith vs. Swan*; [5 *Pick. R.* 238, *Dewey vs. Brown*.] The form of this plea, when pleaded *in bar*, is of course different from that adopted in pleading in abatement, both in the commencement and conclusion. It should begin, like other pleas *in bar*, with *actionem non*, &c. instead of *reddere non potest*; and the conclusion should pray judgment *si actio*, as in other cases, and not judgment of the writ. *App. No. 66.* This plea may be pleaded to the whole, or to any part of the demanded premises. And the only replication, it seems, which can be made to it, is by taking issue upon the non-tenure alleged in the plea. *App. No. 67.*

3. The plea of *DISCLAIMER*, like non-tenure, [221] is very concise, and, like that plea, may be pleaded *in bar*, as to the whole, or any part of the tenements demanded. 13 *Mass. R.* 489, *Prescott vs. Hutchinson*.

When the tenant claims title to a part, and not to the whole, he generally pleads *non disseisivit*, or *non-tenure*, as to that part, and disclaims as to the residue. *App. No. 68.* And where he pleads in this manner, it seems the demandant may join the general issue, and *reply to*

the disclaimer, or not, at his pleasure. If he replies, it is only by taking issue on the disclaimer.

By the statute of 1795, ch. 75, § 2, before mentioned, (*Ante*, p. 176,) it is provided, that when any person or persons shall be sued in a real action for any lands, tenements, or hereditaments, they shall be holden to answer for so much, or such part of the premises demanded, as they then hold, or are in possession of, which they shall distinguish and set forth by their plea, and disclaim in the rest. And if any of them disclaims in the whole, and the demandant cannot prove the tenant's *possession* of the premises, or *any part* thereof, he shall recover his costs.

[222] In this case the statute seems to require a general replication that the tenant *did claim and hold*, much in the same form as the replication to a general plea of *non-tenure*. *App. No.* 69; 14 *Mass. R.* 241, *Otis vs. Warren*; [and see 5 *Greenl.* 413, *Parlin vs. Macomber*.]

The propriety of admitting this plea to be pleaded *in bar*, may well be questioned. It was introduced when the ancient practice in relation to real actions was less understood and attended to, than it has been in later times. But the adoption of this form of pleading has given rise to some *statutory provisions*, which seem now to render its continuance necessary; and no inconvenience appears to have resulted from the *anomaly*.

At common law, such a disclaimer was never considered a *bar* to the action. So far from showing that the demandant had no right to the demanded premises, it was an acknowledgment of his title. It operated, in some respects, as a release by the tenant. If two tenants were jointly sued, a disclaimer by *one* of them generally *vested the whole* in the other co-tenant. If *one*

only was sued, and disclaimed, whatever estate he had was in effect passed to, and vested in the demandant. He therefore might immediately enter, and would become *seised* according to the title set forth in his writ: and the tenant would be afterwards *estopped* from disputing that title. A *disclaimer*, instead [223], of being a *plea to the action*, resembled so far a release, or conveyance of the land, that in general no person could disclaim, who was incapable of conveying the land. An *infant* could not disclaim; nor a *husband* who held only in right of his wife. So an *abbot*, *bishop*, *dean*, or other like *sole corporation*, could not disclaim to the prejudice of the convent or church.

But as a disclaimer was never, at common law, pleaded *in bar of the action*; so neither was it, strictly speaking, a plea *in abatement*. It did not give the demandant a *better writ*. It contained no *prayer for judgment* of any kind. It was not concluded with a *verification*, because it contained no *traversable fact*. It was, in effect, an *offer* by the tenant to yield to the claim of the demandant, and to *admit his title* to the land. This, in many cases, gave to the demandant all the benefit of a judgment in his favour: and he therefore suffered no loss by having his writ abated, or by having the action stopped at that point.

By the common law, *no costs* were recovered in any suit: and unless the demandant had a claim for damages, he had nothing further to demand of the adverse party. The consequence was, that in those real actions, in which no damages were recoverable, the demandant could make *no replication* whatever to a disclaimer; and when it was made by a sole-tenant, [224] it instantly put an end to the suit. But when the demandant was *entitled to damages*, as he was in

some real actions, he might avoid the effect of the disclaimer, by replying that the adverse party *was tenant* of the freehold.

By our laws, no damages are recoverable in any real action. But on the other hand, the costs are considered as a distinct subject of every judgment; and they are, by our statute, to be awarded to the party prevailing, in all civil actions. There is, therefore, notwithstanding the disclaimer, a judgment to be entered for costs, for the party who shall appear to have prevailed in the suit. The action cannot be stopped, without entering a judgment, although the disclaimer be admitted by the demandant. If the tenant never had possession of the land, and is willing to relinquish all claim to it, he certainly ought not to pay costs. He shows that the action ought never to have been brought, and that it cannot be maintained against him. The case is analogous to an action of *Replevin*, brought against one who never had the goods in question. In such a case *non cepit* is a plea in bar; although it admits the plaintiff's title to the goods. On the other hand, the demandant should not, in consequence of a disclaimer, be held to pay costs, if his action was rightly commenced against a party liable to his suit. Our legislature accord-

[225] ingly, in the statute of 1795, c. 75, having allowed a disclaimer in all real actions, provides the same replication for the demandant, *undoubtedly for the purpose of giving him costs*, which the common law provided for him, when he was entitled to damages. 13 *Mass. R.* 439, *Prescott vs. Hutchinson*.

[The abuses and hardships which have sometimes arisen under the operation of this statutory *disclaimer*, and other cases of denial of the tenure alleged, have led the legislature again to interpose, and provide by

stat. 1828, ch. 137, § 4, that on all pleas of non-tenure, disclaimer, several-tenancy, and sole-tenancy, no costs shall be allowed to the party pleading the same, but such as shall accrue after the filing of the plea.]

Where there is a plea of *non-tenure and disclaimer*, and an issue to the country, which is found for the tenant, or if there is no finding upon such issue, it seems the demandant will not be entitled to judgment. 10 *Mass. R.* 64, *Porter vs. Rummary*. For although this defence, if maintained by the tenant, does not disprove the demandant's title to the land in question; yet it may be considered, between him and the tenant, as a bar to the action; because it shows that he had no right to maintain an action, *in any form*, against the tenant. [And where to a plea of disclaimer, in a writ of Entry, the demandant replied, that at the time of the purchase of the writ, the tenant claimed to have title by virtue of a deed from a collector of taxes; upon special demurrer, (*because it was not alleged that the tenant ever had possession,*) it was adjudged, that the replication was bad; and costs were awarded to the tenant. 6 *Pick. R.* 5, *Favour vs. Sargent*.]

It may be proper to add, that in all cases, *the judgment has relation to the plea*, and its effect upon the rights of the parties depends upon the nature of the plea. Therefore, if the tenant should have judgment upon a disclaimer, pleaded in bar, the right of the demandant *to the land* would not be barred by such judgment. Because the record would show that the tenant admitted the demandant's title by the disclaimer; and he would be *estopped* to deny it afterwards. 13 *Mass. R.* 442, *Prescott vs. Hutchinson*.

SECT. XX. Besides the general pleas already [226] mentioned, the tenant may *plead in bar* A CON-

VEYANCE by the demandant to a third person, under whom *the tenant does not claim*. [1 *Greenl. R.* 271, *Prop'r's of Shapleigh vs. Pillsbury*.] For although the tenant may have no title; still, if the demandant has *no right to recover*, he cannot be permitted to draw into question the seisin of the tenant, whether he acquired it by right or by wrong. 6 *Mass. R.* 419, *Wolcot vs. Knight*; *Ib.* 240, 241, *Gould vs. Newman*; 5 *Johns.* 489, *Williams vs. Jackson*; [5 *Greenl.* 15, *Howard vs. Chadbourne*; and see *App. No.* 70.] But such a deed cannot be given in evidence, under the general issue; at least for any other purpose than that of *rebutting the evidence*, which has been given of the demandant's seisin. [See 2 *N. Hamp. R.* 526, *Bailey vs. March*.]

And when this plea is pleaded in bar, the demandant may reply in such a manner as to show, that though such a deed was executed, *nothing in fact passed* by the deed; either because the demandant was disseised before the execution of it, or that the deed, for some other reason, did not take effect. Such a replication, therefore, if true, would effectually avoid the plea.

[It is also competent for the tenant in a writ of entry, *under the general issue*, to disprove the seisin of the demandant, as alleged in his writ, by showing that the demandant's grantor had conveyed the title to another person, previously to his executing the deed to the demandant; although the tenant does not claim title under such prior grantee. 5 *Greenl.* 369, *Stanley vs. Perley*. But if the tenant, after action brought, purchase from a stranger an outstanding title, originally derived from the demandant himself, such newly acquired title cannot be pleaded in bar of the action; though it might have been, if purchased directly from the demandant. 5 *Greenl.* 178, *Parlin vs. Haynes*.]

[If the *grantee* of one who was disseised, at the time he made the conveyance, enter upon the land, he is a trespasser; and having gained possession by his own *tortious act*, he cannot avail himself of his deed to render his continuance in possession lawful. 1 *Greenl.* 238, *Hathorne vs. Haynes.*]

It may often happen, especially in the unsettled parts of our country, where the boundaries of lands are not well ascertained, that the owner of the fee may be disseised, without having any knowledge of [227] the disseisin. And he may execute a deed of conveyance to a purchaser, equally ignorant of the fact. In such a case it is manifest that nothing would pass by the deed. And the law would be most unreasonable, if it determined, that notwithstanding the supposed purchaser *cannot maintain his action* against the disseisor, (since nothing passed by the deed,) that still the *owner should be barred* of his right against the wrongdoer, although he had conveyed nothing by the instrument which he had executed. In this case it is proper to observe, that as the replication alleges *new matter*, it must of course conclude with *an averment*, so as to give the tenant an opportunity to answer it. 1 *Saund.* 103, n. 1; *App. No.* 71.

[Where a person, who has been notoriously disseised, makes a conveyance, purporting to grant the land of which he has been disseised to another, the act is unlawful and void; the title or right still remains in the grantor. And if a writ of Entry is brought in his name, the tenant cannot plead, that the demandant, after the disseisin, made such an unlawful conveyance, and that the action is prosecuted *at the expense*, and *for the use* of the grantee, in pursuance of an unlawful agreement between him and the grantor. 5 *Pick. R.* 348, *Brinley*

vs. *Whiting*. And if an action is brought in such a case, by the grantee in the name of the grantor, *without the knowledge* of the grantor, but is afterwards prosecuted *with his consent*, the court will not order a nonsuit of the demandant. 7 *Pick. R.* 36, *Cleverly vs. Whitney*.]

To the replication, "that nothing passed by the deed," the tenant may rejoin, and take issue upon the fact averred by the demandant. If, upon the trial of such an issue, a verdict is found for the demandant, he shall have judgment to recover the land. 6 *Mass. R.* 420, *Wolcot vs. Knight*.

In a writ of *Right*, where the issue is upon the mere right, it is said every thing but a collateral warranty may be given in evidence. 3 *Wils.* 419, *Tyssen vs. Clark*; [3 *Pet.* 133, *Inglis vs. Trustees of the Sailor's Snug Harbour*; 7 *Cowen*, 52, *Ten Eyk vs.* [228] *Waterberry*.] It seems, therefore, that the tenant in that action may be permitted to give evidence, that the ancestor of the demandant, upon whose seisin he counted, had conveyed the land in question in his lifetime. Consequently it would be competent to the demandant to show, that though such a deed was executed by his ancestor, nothing in fact passed by it to the grantee. 14 *Mass. R.* 203, *Knox vs. Kellock*.

To a writ of Entry in the post, it is said to be a good plea, that the tenant was seised, until the demandant disseised him, and that he re-entered upon the demandant. *Booth*, 180. But it does not seem necessary to plead this defence in bar; at least where the tenant re-entered upon the demandant within twenty years after the disseisin. There are several other pleas which are mentioned in the books, (*Booth*, 179; *Rast.* 272, b; 273, a; 274, a. b; 275, a; 280,) most of which can only

be pleaded, *giving colour*, as it is called. But they seem to be neither necessary nor useful in our practice.

According to the course of proceeding in the *English* courts, where the demandant in a real action counted upon the *seisin of his ancestor*, the tenant might *plead in bar* that the demandant was a *bastard*, and not *heir*. The reason for pleading that fact specially in those courts is, because in that country the courts of [229] common law cannot try the question of bastardy; but are obliged to issue their *mandate* to the bishop, to ascertain and certify that fact. [*See the form of the writ to the bishop, Rast. 105, b.*] But in our courts, that fact may be tried by the jury, like any other; and, when a question arises upon that point, the demandant must *prove that he is heir*, as an indispensable part of his title. Yet, if the tenant should choose to take the exception by a special plea, such a plea would undoubtedly be good.

[It may happen that although the demandant had a good cause of action at the commencement of his suit, his title to the estate may afterwards be determined, and his right of action defeated, either by his own act, or by some other event. In such a case, the act or event which determines his right, should be pleaded in bar of the *further maintenance* of the action.

Thus a clergyman, suing in right of his parish or church, may, after the commencement of the suit, resign, or be dismissed or deprived of his office. And the *resignation, dismissal, or deprivation* may be thus pleaded in bar. *See App. 71, a.*]

SECT. XXI. By the statute for the *limitation of Real actions, and equitable settlement of certain claims arising therein*, (*Mass. Stat. 1807, ch. 74, § 2.*) where the *tenant*, or person under whom he claims, has had actual possession for the term of six years or more,

before the commencement of the action, the jury, if they find a verdict for the demandant, shall, (if the tenant request the same,) also inquire, and by their verdict ascertain, the increased value of the premises, by virtue of buildings or improvements made by the tenant, or those under whom he may claim. And if the demandant require it, they shall also ascertain what would have been the value of the demanded premises, had no buildings or improvements been made by such tenant, or those under whom he may claim.

The demandant may, at the same term, elect to receive of the tenant the sum that the jury have [230] found the tenements would have been worth, without the improvements. And by a subsequent statute, (1809, ch. 84,) it is to be paid to the demandant in three annual instalments, with interest. [See 3 *Greenl.* 377, *Knox & al. vs. Lermond*, and 4 *Greenl.* 297, *Winthrop vs. Curtis*.] If the tenant fails to pay, the demandant shall have his writ of seisin. But if the demandant makes no such election, he shall not have his writ of seisin, unless he shall within one year pay the amount of the betterments, (as it is called,) with interest to the time of payment. And by a still later statute, (1819, ch. 144,) the benefit of this provision is extended to all persons, who at the time of the commencement of the suit may hold *by virtue of a possession or improvement*; they, or those under whom they claim, having had *actual possession* for six years or more, before the commencement of such action.*

* By a stat. of *Maine*, 1821, ch. 47, § 4, the tenant or his attorney may offer and give notice in open Court, at what sum he is willing his buildings and improvements, and at what sum the demanded premises, (or the part thereof by him defended,) *without* the buildings and improvements shall be estimated; which shall be

[A tenant in common who has ousted his co-tenant, is entitled to have a *moiety* of the increased value of the premises, by means of his improvements, ascertained by the jury. 1 *Greenl.* 89, *Bracket vs. Norcross.*]

In order to avail himself of the benefit of the statute, the tenant should make his election *upon the record*, at the original trial. 7 *Mass. R.* 472, *Hart vs. Johnson.* It is usually subjoined to the tenant's plea of the general issue. *App. No.* 72.

If the demandant desires the inquiry to be made on his part, he must in like manner put it upon the record, with that of the tenant. *App. No.* 73.

[Where the tenant, in a writ of Entry, files his claim for *betterments*, and the demandant requires that the value of the land *without the improvements* should be found, it is not necessary to frame a *special issue* on the possession of the tenant. And if he has not been in possession *six years*, the jury may find that fact, which will be a sufficient reason for not inquiring into the value of the improvements. 6 *Pick. R.* 172, *Poignard vs. Smith.*]

entered on the record of the Court. And if the demandant consent to the same, judgment shall be entered, as upon a verdict, for the demandant, estimating the value at the like sum. But if the demandant shall not accept of such offer, and shall proceed in the suit, and the jury shall not estimate the buildings and improvements *below* the tenant's offer, nor *increase* the value of the demanded premises above it, the tenant shall recover costs against the demandant, *after the first entering the notice upon record.* When this offer is once made, it cannot be withdrawn, it seems, any more than any other admission entered of record. And where the jury estimated the value of the land at a less sum than the tenant had offered, and the demandant appealed; it was held that the proceeding below being nullified by the appeal, the demandant might accept the offer in the court appealed to. 2 *Greenl.* 352, *Proprietors of the Kennebeck Purchase vs. Davis.*

The intention of the legislature manifestly was to provide for those settlers upon lands, who had entered without the consent or knowledge of the proprietor. And it cannot be so construed, as to extend to those, who have entered under a lawful contract, by the performance of which they would have been entitled to a conveyance of the land, or to damages, if the proprietor had refused to perform the contract on his part. For such persons cannot be said to hold the lands *by virtue of a possession and improvement*. 12 *Mass. R.* 329, *Knox vs. Hook*.

But where a person in possession of land, under a written contract with the proprietors, for the purchase of it at an agreed price, (for which he gave his promissory note, which was never paid,) afterwards conveyed *all his right in the land* to a stranger, who *had no notice* of his contract with the proprietors; it was held by the Supreme Court of *Maine*, that the grantee, after more than six years' possession, was entitled to the increased value, by reason of *his own* improvements, but not for those made by *his grantor*. 1 *Greenl. R.* 348, *Prop. of Kennebeck Purchase vs. Kavenagh*. And a person holding lands under a title believed by him to be good, but which was in fact always bad, in consequence of which he has been evicted, is entitled to the benefit of the statute, if he has made improvements upon the estate. 17 *Mass. R.* 350, *Newhall vs. Saddler*; [5 *Pick. R.* 140, *Heath vs. Wells & al.*]

[The equitable claims of a tenant under the betterment act, are not affected by a judgment in petition for partition, even though he has appeared as a respondent, and pleaded to the process. 5 *Greenl.* 153, *Baylies & al. vs. Bussey*. An abandonment of the premises by the demandant, and payment by the tenant of the estimated

value, has the effect of a conveyance to the tenant. 1 *Greenl.* 309, *Prop. of Kennebeck Purchase vs. Davis.*]

SECT. XXII. If the tenant in a writ of Entry does not *disclaim*, or plead *non-tenure*, but [232] goes to trial upon the *general issue*, he thereby *admits* that the demandant has been *ousted by him*, and that he is *tenant of the freehold*, from which the demandant was ousted. And this rule holds, even in the case of an ouster of a tenant in common by his co-tenant; (1 *Pick. R.* 318, *Stevens & ux. vs. Winship & ux.*) and the action of a *trustee* against the *cestui que trust*. 2 *Pick. R.* 510, *Russell vs. Lewis*. Neither of those facts therefore need to be proved at the trial on the part of the demandant. 8 *Cranch*, 243, *Green vs. Liler*; 5 *Mass. R.* 352, *Higbee vs. Rice*; [13 *Mass. R.* 259, 443; 2 *N. Hamp. R.* 10, *Mills vs. Pierce.*] After pleading the general issue, the tenant shall *not be permitted* to give evidence that he claimed to be in, as tenant at will only, and not as *tenant of the freehold*; because such evidence would be repugnant to the plea. 7 *Mass. R.* 381, *Pray vs. Pierce*.* And even where *several tenants*, claiming by distinct titles, are joined in the *same writ*, and they neglect to take the exception, by pleading in *abatement*, (as *non-tenure*, *several-tenure*, or a *disclaimer*,) but join in the *general issue*, it is an admission that they are *joint-tenants of the whole*. And if the jury find for the demandant, the verdict must be *general*, that

* By a stat. of Maine, 1826, ch. 344, the plea of *nul disseisin* is no longer to be considered an admission by the tenant, that he is in the seisin of the demanded premises. Consequently, a judgment for the tenant, which was, as between him and the demandant, evidence of title to the land, is not so under this statute; since the tenant may have prevailed, because the demandant did not prove he was in possession of the land, as the statute requires. See 5 *Greenl.* 432, *Cutts vs. King*.

the tenants disseised him. 8 *Cranch*, 250, *Green vs. Liter*.

So where there are several tenants in a Real action, who plead the *general issue*, they cannot be permitted to give evidence that *some of them had no title to certain parcels of the demanded premises*, but claimed to hold the same under a third person, who had a legal title thereto. *Wheat*. 360, *Green vs. Liter*. For [233] such evidence can only be given under a plea of *non-tenure or disclaimer*.

[It is also a rule of law, that *pleading to the merits* is an admission of the competency of the demandant or plaintiff to sue, in the capacity or character which he assumes in his writ; and of his right to sue in the particular action which is brought. 1 *Pet. R.* 386, *Conard vs. Atlantic Ins. Comp.*; 4 *Pet. R.* 501, *Society for propagating the Gospel vs. the town of Pawlet*.]

The tenant may give in evidence *a release*, which was made to him by the demandant, *after* the commencement of the action; notwithstanding the general principle, that the rights of the litigating parties are to be tried and determined, according to their situation at the time the suit was commenced. 10 *Mass. R.* 134, *Poor vs. Robinson*. [But the demandant cannot fortify his title by the production of a deed, made to him by a third person, after the commencement of his action. 2 *N. Hamp. R.* 10, *Mills vs. Peirce*.]

From the general principles, which have been thus briefly stated and explained, it results as a **GENERAL RULE**, that where the tenant in a writ of Entry pleads the *general issue*, if the demandant proves the seisin of himself, or of his ancestor, upon whose seisin he counts, *according to the allegations of his writ*, **HE MUST RECOVER**, unless the tenant can show that *his own entry*

was by *judgment of law*, or by *other lawful title*. 6 *Mass. R.* 418, *Wolcot vs. Knight*; *Ib.* 356, *Newhall vs. Hopkins*. [And in order to do this, he must prove that the person who is named in the demandant's writ, as the disseisor, (whether it be the tenant himself, or the person under whom he came in, either in the *per*, the *per* and *cui*, or in the *post*,) had a lawful *right of entry* upon the person who is alleged to have been disseised. It is the *right of entry, strictly*, that is to be proved by the tenant, and not the right of *possession* or of *property*. For if the right of entry was *toll*ed, or lost by lapse of time, when such person entered, it is manifest that his entry was *unlawful*, and consequently a disseisin, as alleged in the writ. And it was for want of sufficient attention to these principles, that formerly the trial of the issue of *nul disseisin*, in a writ of Entry, was conducted much in the same manner, as if the issue had been upon the *mere right*, and the action a writ of right. The consequence was, that the tenant sometimes prevailed, where, in consequence of the right of entry being barred, when the entry was made, the disseisin complained of had manifestly been committed.]

If the tenant in a writ of Entry is ousted pending the suit, by a stranger who has a better title, it will abate the writ. So also, if the land is recovered against the tenant by a stranger, it will abate the writ, unless the recovery is by collusion. But in both cases the matter must be specially pleaded, as a plea [234] *puis darrein continuance*. This in some measure resembles the exception of non-tenure, and cannot be given in evidence under the general issue. And if the *ouster* or the *recovery* is by *collusion*, the plea may be avoided by replying that fact. 14 *Mass. R.* 410, *Walcutt vs. Spencer*; *Com. D. Abatement*, H. 54, H. 56.

[But a plea, that during the pendency of the action, a creditor of the *tenant* has levied an execution on the demanded premises, will not abate the writ. 2 *Pick. R.* 319, *Eldridge vs. Acocks & al.*]

The tenant cannot defend himself *under the general issue*, by showing that he is guardian to the demandant, and as such entitled to enter upon the land, and take the profits. For such an authority does not confer any *title* upon the guardian; and if he would avail himself of this defence, he must do it by a plea of *special non-tenure*, in which he must set forth the nature and extent of that authority. 12 *Mass. R.* 373, *Dunbar vs. Mitchell*. [If the guardian holds over against his ward, it is a case of a disseisin by *continuance* of possession. *Co. Litt.* 271. a.]

The right of the demandant to recover in a real action often depends upon a *comparison of titles*, between him and the tenant. And this comparison frequently involves not only the *construction of the language*, and the *legal operation of deeds, wills*, and the *returns of official acts* by ministerial officers; but also, in many instances, the *acts*, and even the intentions of the parties, or of those under whom they respectively claim. Most of these subjects have been noticed in the IN-
[235] TRODUCTION; and a particular consideration of them would lead to a more extended discussion, than could be admitted in this place. We shall therefore only remark, that in these actions, as in other cases, the rights of the parties are not always determined by *direct and positive evidence*. In many cases juries are not only permitted, but required, from certain *facts which do appear*, to infer or presume the existence of *other facts which do not appear*, and to decide in the same manner as if the presumed facts had been fully proved;

especially after the transaction has been long acquiesced in, by those who are interested to impeach it. See 1 *Phil. on Evidence*, 119.

In illustrating the foregoing remarks, in order to explain to the student the application of these principles to the trial of real actions, we shall confine ourselves to two cases. *First*, Where there is a *defect* in the documentary evidence of title, *of some material circumstance or fact*, which may have existed or been done, although it cannot now be proved: *Second*, Where no *written* evidence of title is produced; and the party rests upon the *possession*, connected with the acts and circumstances which accompany it; and which may be such as to *confirm*, or to *explain*, *qualify*, or *control* it.

1. Examples of the first kind frequently occur [236] in the titles derived from conveyances made by persons acting under a *power*, *trust*, or *authority*, created by the owner of the estate, or conferred by the law; as conveyances by executors, administrators, guardians, trustees, attorneys, sheriffs, collectors of taxes, and the like.

Thus, where title was derived under the sale of lands by a collector of taxes, it was held, after the lapse of *thirty years*, that it was not necessary to prove that every requirement of the law, in order to render such a sale valid, had been strictly complied with. 10 *Mass. R.* 105, *Colman vs. Anderson*. The Chief Justice, in pronouncing the opinion of the court, said, that if the jury were satisfied that the defects in the evidence were not chargeable to the default or negligence of the tenant, and that nothing in his power to produce was *wilfully withheld*, they ought to consider every thing proved, *which could fairly and reasonably be presumed* from the facts and circumstances given in evidence. And he

added, that at such a distance of time, it would be unreasonable to require of a party *strict* evidence from documents, which were not entrusted to his custody, nor transferred with his title. [See 1 *Mass. R.* 159 ; 2 *Mass. R.* 538 ; 14 *Mass. R.* 261 ; 17 *Mass. R.* 68.]

So, where the heirs had acquiesced more than [237] *twenty years*, in a sale of real estate by an administrator, for the payment of debts, proof being given of a license to sell, and an *actual sale of the property at auction* ; it was held that the jury might *reasonably presume*, that the oath required by law had been taken by the administrator, and that regular notifications had been posted, previous to the sale. And the court further remarked, that at the time this sale took place, there was *no provision* for perpetuating the evidence of sales under a license of court. If under such circumstances, no presumptions were to be allowed in favour of the purchaser, the title to many estates, holden under such sales, would be shaken, if not destroyed. And they added, that these presumptions did not go further than the common case in the *English* practice, of presuming a grant, after twenty years' undisturbed possession. 3 *Mass. R.* 399, *Gray vs. Gardner*. And see 1 *Phil. on Evid.* 120 ; [3 *Stark. on Evid.* 1235, 6.]

By a statute of *Massachusetts*, 1817, ch. 190, § 12, no license for the sale of lands, granted by any court, shall be in force longer than one year from the time of granting the same. And no action, brought by any heir or other person interested in any real estate, sold under such license, shall be sustained, unless brought *within* five years after the delivery of the deed, given under such license. *Provided always*, that minors and other persons under legal disabilities, and persons out of the commonwealth at the time of the sale, may maintain

such action at any time within five years from the removal of such disabilities, or from their return to the commonwealth.

[This limitation has been held to apply only to sales made subsequent to the passing of the statute. *Holyoke vs. Haskins*, 5 Pick. R. 20.]

Generally, where there has not been a *long acquiescence*, *heirs at law*, *creditors*, and others interested in an estate, which has been sold by executors or administrators, under a license from a court, are not concluded by such sale, in derogation of their rights, unless every *essential requisite* or direction of the law, in relation to the sale, has been faithfully complied with. [In *Holyoke vs. Haskins*, 5 Pick. R. 20, it was held that such a sale might be avoided by the heir, even after a lapse of twenty years.]

But *strangers to the title*, who have no privacy of estate or interest, to be affected by the [238] sale, and who pretend none, are not entitled to require strict proof of the proceedings of an executor, administrator, or agent duly authorized to sell, and whose deed, purporting to be made pursuant to such authority, is produced. 7 Mass. R. 488, *Knox vs. Jenks*.

And where the fault is not in the party who makes the sale, but in the court that grants the license; as where a court of Common Pleas, having jurisdiction of the subject matter, grants a license to sell, upon a certificate of the Judge of Probate, not authorized by the circumstances of the estate, the purchaser will be protected. 11 Mass. R. 227, *Perkins vs. Fairfield*.

[So, where the original proprietors of certain common lands, after having laid out a tract to A., voted that the location should *be void*, and A. and his heirs acquiesced in the vote for a long time, never having entered

upon the land; and the proprietors afterwards laid out the same land to another person, who took possession of it: it was *held* that a *stranger*, who did not pretend to claim under the first laying out, could not be permitted to contest the title of him, to whom it was last laid out, on the ground that it was incompetent to the proprietors to annul their first location. 4 *Pick. R.* 156, *Davis vs. Mason.*]

2. A grant of the *land itself* may be presumed, as well as a grant of an interest, privilege, or easement in land; such as a *fishery*, a right of *common*, or a right of *way*. [Thus, after a lapse of more than seventy years without any adverse claim, the jury may presume a grant from the original proprietor of a share in a township of land, to a person who always acted as grantee of such share, sustaining various offices as a proprietor, and paying taxes for such share; although the land be wild, unsettled, and not held by any open and visible possession. 1 *Greenl.* 17, *Farrar & al. vs. Merrill.*] But the grant to be presumed must be of such an estate, as is conformable to, and not inconsistent with the *nature of the possession*, and the acts and declarations of the parties, during the whole period that it continued. For although a party, whose title is *clearly made out*, is not to suffer, in consequence of *misapprehension* in relation to its nature and extent; yet the jury can never [239] be permitted to presume a grant of a *greater estate* than the party *claims for himself*, by resorting to the supposition of a *mistake as to the extent of his rights*. The supposition of such a mistake is subversive of the whole foundation of the presumption. He therefore, who would claim from the jury the presumption of a grant in his favour, must first establish by competent proof, not only the fact that he was in pos-

session, but also, that he *claimed such an interest*, as he would have the jury presume had been granted to him: at least, that he never claimed or admitted an *inferior title*. [1 *Greenl.* 111, *Bethum vs. Turner*; 4 *Greenl.* 77, *Hale vs. Inhabitants of Portland*.]

The law will consider every possession lawful, the commencement and continuance of which are not shown to be wrongful. And it proceeds upon the principle, that every man shall be presumed to act conformably to his rights and his duties, until the contrary is made to appear. But from the *mere fact of possession*, the law only presumes that the present occupancy is by right. Therefore, when a naked possession is proved, unaccompanied by any evidence as to the manner in which it commenced, it is to be deemed lawful; and that the title is co-extensive with the right which is claimed by the party. If he claim an estate *less than the fee*, the law cannot, *contrary to his admissions*, confer upon him the fee. And it may be here observed, that this principle has no reference to the maxim, that a *disseisor cannot qualify his wrong*: because that ap- [240] plies only to those cases where the party *admits himself, or is proved to be in by disseisin*.

Presumptions of this kind are adopted from the *general infirmity* of human nature, the *difficulty* of preserving muniments of title, and the *public policy* of supporting long and uninterrupted possessions. They are founded upon the consideration, that the facts are such as could not, according to the ordinary course of human affairs, occur, unless there was a transmutation of title to, or an admission of an existing adverse title in, the party in possession. They may, therefore, be encountered and rebutted by contrary presumptions; and can never fairly arise where all the circumstances are per-

fectly consistent with the non-existence of a grant. *A fortiori*, they cannot arise where the claim is of such a nature as is *at variance* with the supposition of a grant. In general, it is the policy of courts of law, to limit the presumption of grants to periods *analogous to those of the statute of limitations*, in cases where the statute does not apply. But where the statute applies, it constitutes, ordinarily, a sufficient title or defence, independent of any presumption of a grant; and therefore it is not generally resorted to. But if the circumstances of the case justify it, a presumption of a grant may as well be made in the one case as in the other; and where the other circumstances are very cogent and full, [241] there is no absolute bar against the presumption of a grant, within a period *short of the statute of limitations*. 7 *Wheat.* 59, *Ricard vs. Williams*; [and see 3 *Greenl.* 120, *Tinkham vs. Arnold.*]

[To guard against the hardships that sometimes arise under the rule of law which confers a title to an easement, after twenty years enjoyment of it, the legislature of Massachusetts have provided, by stat. 1824, ch. 52, that no right shall be deemed to have accrued to any person or corporation, to have any privilege of *light, air, or way*, from, in, upon, or over the land of another, in any case where the owner, or his guardian, shall, before such right has accrued, cause a notice of his intention to prevent the accruing of such right, to be recorded in the registry of deeds for the county where such land lies; and a copy thereof to be served upon such person, his agent, attorney, or guardian, if within the commonwealth; and if not, upon the tenant of the land, in favour of which such privilege might accrue by lapse of time: or in the case of a corporation, upon the presi-

dent, secretary or clerk thereof. And the evidence of such service shall be recorded with the notice.]

In writs of Entry and other Real actions, if the tenant would avail himself of the statute of limitations in relation to the seisin or entry of the demandant, or of those under whom he claims, or the time of commencing the suit, he is *not required to plead it*, as in personal actions. In these actions, the whole subject of limitation is matter of evidence on the trial.

If the demandant avers a seisin in himself or his ancestor, within a period *exceeding the time of limitation* allowed for bringing such an action; (as where he alleges a seisin within *forty*, instead of *thirty* years,) the writ will be bad on demurrer. And if he avers a seisin within thirty years, the tenant by pleading the general issue, does not thereby *admit* that the action is commenced *in season*, as in the case where he pleads the general issue in most *personal actions*. The demandant, after alleging, must *also prove the seisin* within the period stated in the count.

It is true, however, that if the demandant should prove that he or his ancestor entered, and thereby became seised, *more than thirty years* before the commencement of his action, *it will be presumed*, in the absence of all evidence to the contrary, that [242] his seisin continued until within that period. But if the demandant should prove an entry, (either by himself, or his *ancestor* on whose seisin he counts,) *thirty-two years* before the commencement of the action; and the tenant should then prove an *ouster of the same party, thirty-one years before the suit*; the demandant must now fail, unless he can show a re-entry within *twenty years after that ouster*, and consequently a seisin

within *thirty years before* the commencement of the action.

It may be useful to remind the student, that although every right of entry, (where no disability exists,) is barred by an adverse seisin continued for twenty years, without entry or claim of him who has right; yet where there is a tenant for years, or for life, with a *remainder over* for life, or in fee, and the particular tenant is ousted by one who afterwards holds adversely to such tenant, for thirty or forty years; still upon the determination of the particular estate, he who has the title to the remainder may enter. For the seisin of him who ousted the particular tenant, is not *adverse to the remainder-man*, and therefore does not affect his right of entry. And even where the particular tenant refuses to enter, so that the remainder-man would be *entitled to* [243] enter immediately; yet he is not *obliged to enter*, until the regular termination of the particular estate. 9 *Mass. R.* 508, *Wells vs. Prince*; 15 *Mass. R.* 471, *Wallingford vs. Hearl*. [Thus, where there is a tenant for life, with a remainder in fee; if the tenant for life should commit a forfeiture of his estate, so as to entitle the remainder-man to enter *immediately*; yet he is not obliged to enter for the forfeiture, but may wait until the death of the tenant for life, when a new right of entry will accrue to him. 1 *Pick. R.* 318, *Stevens & ux. vs. Winship & ux.*; 7 *East*, 321, *Cook vs. Danvers*. For the same person may have two rights of entry, one of which may be lost, without impairing the other. *Ib*; 2 *Salk.* 422, *Hunt vs. Burn.*]

[If I lease lands to a man for twenty years, and a stranger enter and disseise me, and oust my tenant, and die seised, after *five years'* peaceable possession, and the land descend to his heir; in this case, my entry is

taken away. Yet my tenant may enter, because he only claims to hold the land for a *term of years*, and his entry does not *oust* the heir of the disseisor from the freehold, of which he is seised by the descent. *Litt.* § 411; *Co. Litt.* 249, a. But if there had been tenant *for life*, with a remainder or reversion in fee, and a stranger had entered and ousted the tenant for life; in this case the re-entry of the tenant for life would have restored the seisin of the owner of the remainder or reversion. *Litt.* § 416.]

SECT. XXIII. Upon the VERDICT in Real actions, few questions arise in our practice. Care should be taken, however, to have it drawn up in such a manner as to conform to the points in issue between the parties. But if the *substance* of the issue is found for the demandant, he will be entitled to judgment, though all the circumstances are not found. As where in a writ of Entry against tenant in dower, who pleads that she *did not alien, modo et forma*; if it should be found by the verdict, that she aliened *in tail*, or for the life of another, this would be a finding for the demandant; though the alienation was not precisely in the *manner* that he has declared. *Litt.* § 483. For in this case the substance of the issue is, whether the tenant attempted to convey a greater estate, than for her own life. *Co. Litt.* 281, b. 282, a; and see 10 *Mass. R.* 64, *Porter vs. Rumney*.

The jury should pass upon *all* the matters submitted, and cannot find a verdict as to one part of the demand, and omit to find as to another part of it. 2 *Johns. R.* 210, *Brockway vs. Kenney*; 6 *Mass. R.* 1, *Holmes vs. Wood*. And where there are several issues joined, the jury must pass upon each of them; [244] because a judgment entered upon a verdict, find-

ing only *one* issue where several are joined, will be erroneous, unless the issues which are not found are *immaterial*. 4 *Johns. R.* 213, *Van Bantuyssen vs. De Witt*.

Where the parties, under the *Limitation and Settlement Act*, (*Mass. Stat.* 1807, ch. 75, § 2,) pray an inquiry by the jury, as to the *increased value* of the tenements, by means of buildings and improvements, and also what would have been the value, without the improvements, the finding of the jury upon these points should be subjoined to their verdict. *App. No.* 74. [If a question is made, whether the tenant has been in possession six years, where he requests an inquiry into the value of the improvements; the jury may, without any special issue upon that point, find the fact that he has not been in possession six years, and it will be a sufficient reason for their not inquiring into the value of the improvements. 6 *Pick. R.* 172, *Poignard vs. Smith*.]

A verdict does not cure a *defective title*: but where the title is good, though defectively set forth, it will be aided by a verdict for the demandant. 4 *Mass. R.* 67, *Wells vs. Prince*; 1 *Saund.* 228, n. 1. [Thus, if in a writ of Entry it be alleged in the count, that the tenant disseised the demandant, and that allegation be *traversed* by the plea, but there be no averment that the demandant was seised; the want of such an averment will be cured by a verdict, finding the issue for the demandant. For he could not have been disseised, unless he had been seised. 6 *Pick. R.* 409, *Ward vs. Bartholomew*. When the jury return their verdict, the court are not bound, at the request of a party, to poll the jury and inquire of each juror separately if he agree to the verdict; but it may be affirmed by them collectively. 4

Pick. R. 239, Ropps vs. Barker & al. A special verdict, if defective, cannot be amended by the minutes of the judge, without consent of parties. But with consent, it seems it may be so amended. 8 *Pick. R. 520, Walker vs. Dewing & al.*]

The JUDGMENT for the demandant, in a writ of Entry, upon a default, as well as upon a verdict, is that he recover *his seisin* in the tenements aforesaid with the appurtenances, *and his costs of suit*. [If the jury return their verdict for a less portion of the land, than the demandant claims in his count, he will be entitled to judgment for the share to which he makes out his title. If he demands the entirety, he may recover a moiety or other share; and where he demands a moiety or other share, he may have judgment for a less portion than is demanded, but not for a greater. 3 *Pick. R. 62, Somes vs. Skinner*; 2 *Pick. 387, Dewey vs. Brown*. And in this respect, it was held by the Supreme court of the *United States*, that there was no difference between an Ejectment or writ of Entry, and a writ of Right. 3 *Pet. 134, 187, 189, Inglis vs. Trustees of the Sailor's Snug Harbour*. And see *Hob. 272, 282, Clanrickard vs. Sidney*.] No damages are recovered in any real action except *Dower*; though the writ contains an allegation of damage, in compliance with the general form prescribed by our statute.

But though the demandant cannot recover damages in a writ of Entry, he is not in all cases [245] without remedy for the injury he may have sustained, by being deprived of the use and enjoyment of his property. For if, at the time he commenced his action, he had a *right of entry* into the land in question, he may, *after* he has recovered judgment in his writ of Entry, maintain an action of *trespass FOR THE DIS-*

SEISIN, or, as it is more commonly denominated, for the MESNE PROFITS. But where the demandant has lost his right of entry, he is generally without remedy for the injury arising from the deprivation of the use of his property, as will be more fully explained hereafter. See Chap. 8.

The time for entering judgments *of course*, in our practice, is on the last day of the term. And all judgments are considered as entered on that day, unless upon motion they are particularly noted, as of some earlier day. But where no cause is shown to the contrary, the party who prevails in the suit may have judgment, upon motion, within twenty-four hours after *verdict, default, or nonsuit*. 8 Mass. R. 119, *Herring vs. Polley*.

Upon the judgment for the demandant, in writs of Entry and other real actions, process of EXECUTION issues, which is denominated a writ of *Habere facias seisinam*, from the command to the sheriff, in [246] the writ, that he *cause the demandant to have seisin* of the tenements recovered. The writ also contains a direction to the sheriff to levy and satisfy to the demandant the costs of suit, awarded to him by the judgment, in the same manner as in personal actions.

After judgment, this writ may be issued and executed forthwith, except in those cases where the *increased value of the tenements*, by reason of buildings and improvements, and the value *without those improvements*, have been ascertained by the jury. But where this matter is found by them, the demandant may make his election, to abandon the land to the tenant, at the price estimated by the jury; in which case the latter must pay the price thus fixed, with the interest thereof, within three years, in three annual instalments. But if

the demandant does not elect to abandon the land, he must pay to the *clerk*, or such other person as the court may appoint, for the benefit of the tenant or other person entitled, such sum, with the interest thereof, as the jury may have assessed for the buildings and improvements, within one year after the judgment; and thereupon he will be entitled to his writ of *Habere facias seisinam*. Stat. 1807, ch. 75, § 3; 1809, ch. 84. This writ is to be executed by the *sheriff* or *his deputy*, who is to cause the demandant to have *seisin* of the lands recovered, by removing therefrom, if [247] necessary, the tenant, or any other persons who may be in possession, and putting the demandant or his attorney in their place. He is also to levy the costs, (if the tenant does not pay them,) upon the personal chattels of the tenant, or upon his body.

The demandant, who has recovered judgment in a real action, may enter immediately upon the lands recovered, without suing out a *Habere facias seisinam*; though the common practice, (especially where the tenant is in actual possession,) is to take a writ, and have it regularly executed by the sheriff. This being done, and the writ with the certificate of the sheriff, being returned and filed in the office, the cause is terminated, and the parties are again *out of court*.

CHAPTER IV.



PART III.

Writs of Entry to foreclose Mortgages. Writs of Entry by Executors and Administrators to recover lands set off upon Execution.

[248] SECT. XXIV. THE restraints which the *Feudal law* imposed upon the alienation of real property, prevented its being made in any considerable degree subservient to the common exigences of the owner, either by the sale of it, or as a pledge. Mortgages, it is generally believed, were wholly unknown among the *Saxons*. But as early as the reign of Henry II. two modes of pledging lands had been introduced; both of which were probably borrowed from the customary law of *Normandy*. *Gr. Coust.* ch. 20. The first was called *vivum vadium*, because the profits of the land were received by the lender, in discharge of the debt; after which the pledge was to be restored to the borrower. The other was denominated *mortuum vadium*, because the profits, received by the lender, did not go to discharge the debt, but were lost to the borrower. The first, says *Glan-*
 [249] *ville*, is *just*; the other is *dishonest*: and though not prohibited by the King's court, it is considered a species of *usury*. Therefore if one dies, holding such a pledge, and after his death this is proved,

his property shall be disposed of, as the property of an usurer.* [See 1 Reeves' Hist. 163.]

This mode of pledging real property soon gave rise to great abuses, as well as inconveniences. For if the money was not paid at the *precise time* limited in the condition, the lands were forfeited, and forever lost to the debtor. Even in the time of lord Coke, (as appears by the only cases on mortgages contained in his Reports,) the courts of law could give *no relief*, after breach of the condition. 5 Co. 95, *Goodall's case*; *Ib.* 114, *Wade's case*.

These hardships compelled mortgagors to apply to the court of *Chancery*, in order to obtain some mitigation of the *rigour of the common law*. And that court seems to have been very willing to avail itself of so fair an opportunity of extending its jurisdiction. It was accordingly soon resolved, that the condition of the mortgage *ought to be regarded as a penalty*, against which *equity should give relief*. And it immediately became a *maxim* in that court, that though *the* [250] *condition was not performed*, yet, if the debt and interest were paid in a reasonable time, the lender should reconvey the land. This right of having a reconveyance, upon payment of the debt, was denominated an *Equity of redemption*; a term invented after the time of lord Coke, or at least not mentioned in any of his works.

Soon after this jurisdiction was assumed by the *Chancery*, it became necessary to set limits to the right of the debtor to redeem. And from analogy to the provisions of that part of the statute of *limitations* which relates to a right of entry, it was limited, in common cases, to

* *Unde si quis in tali vadio decesserit, et post mortem ejus hoc probatum, de rebus ejus non aliter disponetur, quam de rebus usurarii.* Glanv. lib. x, c. 8.

twenty years after obtaining quiet and uninterrupted possession of the mortgaged premises by the mortgagee.

The *different disposition* which the law of *England* makes of *real* and *personal* property, upon the death of the proprietor, early gave rise, in these cases, to controversies between the *heir at law* of the mortgagee, and those who were entitled to distributive shares of the personal property. From the nature of these controversies, the parties were obliged to resort to the court of *Chancery* for its direction and decision. That court, from the constitution of its jurisdiction, being able to take into view the whole ground of these conflicting rights, soon established a system of principles, the result of which it has attempted to embrace in the

[251] GENERAL RULE OF EQUITY, that where a person

dies, leaving *several* funds, *one* of which must be charged with a particular debt, that which *received the benefit* by contracting the debt, shall be *held to satisfy it*. *Cruise, Tit. XV. ch. 4.* Still, the adjustment of these claims upon the death of the parties has always been attended with inconveniences, many of which arise from the different nature of the *debt* and the *pledge*, and the consequent separation of rights. To avoid some of these inconveniences, mortgages, in *England*, are often made of a term of years, instead of the fee. This course however is by no means free from objection; because, if the estate is foreclosed, the mortgagee will only be entitled to *his term*. And to guard against this inconvenience, the mortgagor has sometimes been made to covenant, that upon foreclosure, he would not only confirm the term, but also convey the freehold to the mortgagee, or such other person as he should appoint,

discharged of the equity of redemption. *Bac. Abr. Mortgage, A.*

In our law, the inconveniences to which we have alluded, would have been much less than in *England*; because the disposition which the law makes here, of real and personal property, upon the decease of the proprietor, is very nearly the same. But in addition to this circumstance, it is to be recollected that the legislature has provided by statute, (1788, ch. [252] 51,) that upon the death of the mortgagee, his executor or administrator shall have the *entire control* of all his mortgages, which, with the personal property, constitute a fund for the payment of his debts; and if not needed for that purpose, the proceeds of them are to be distributed as personal property. It may be proper, however, to mention, that where a note and mortgage are made to husband and wife, they shall go to the wife, if she survive the husband, and not to his executor: unless such note and mortgage are a mere *voluntary gift* by the husband to the wife, by which his creditors may be defrauded. 16 *Mass. R.* 480, *Draper vs. Jackson et ux.*

The heirs, therefore, having no concern with this part of the ancestor's estate, by our law, we have avoided much of the embarrassment which attends these transactions in *England*. And our course of proceeding to enforce the right of the mortgagee, (of which we are now to give some account,) is very different, in most respects, from the practice adopted in that country. In the remarks which follow, we must confine ourselves to the consideration of the remedy of the mortgagee or his assignee, who is desirous of obtaining possession, in order to *foreclose* the mortgage, unless the debt is paid. The *general law of Mortgages*, and the remedy

or relief of the mortgagor, by *Bill in Equity*, are not embraced by the plan of this work, which is limited to *Real actions*.

[253] SECT. XXV. It has been already mentioned, that mortgages in *Massachusetts* are foreclosed, by taking actual possession of the mortgaged premises, after condition broken, (either by *open and peaceable entry*, or under the *judgment of a court of law*,) and continuing such possession *three years*, without any decree of foreclosure. The consideration of the manner in which such an entry upon the mortgaged premises should be made, by the mortgagee or his assignee, in order to avail him, as a summary mode of foreclosing the mortgage, does not belong to the subject of the present chapter. The student will find some of the leading cases upon that subject in the *Introduction*. See § 14.

The remedy resorted to by the mortgagee or his assignee, for the purpose of obtaining possession *by process of law*, is a *special writ of Entry*, which is expressly authorized by the statute of 1788, ch. 51. Two forms have been adopted in our practice for this purpose; and both of them are somewhat different from the common writ of *Entry sur disseisin*, which is used in other cases. For instead of declaring *generally* upon his own seisin, and a disseisin by the mortgagor, as in a common writ of *Entry in the Quibus*, the mortgagee or assignee may count in either of two ways. *First*, Upon his own seisin *in fee and in mortgage*, so that it may appear that he claims to be tenant in mortgage only, and not the absolute owner of the fee. *App. No. 34*. *Second*, He may allege that the mortgagor was seised, and conveyed to him by deed duly executed, which he must plead with a *profert*, so that on production of the deed, it may appear to be a conveyance *in mortgage*. *App. No. 37*.

The *first* method, (of declaring specially that the [254] demandant was seised *in fee and in mortgage*, and that the tenant disseised him,) is good in all cases; and it seems to be *necessary*, where the condition appears only by a defeasance, and consequently is not in the *possession of the mortgagee*. The *second* form is sufficient, where the condition is a *part of the deed*, by which the land is conveyed: because upon *oyer* of the deed the condition would sufficiently appear. But it is otherwise, where the condition is contained in a deed of defeasance, and is in the possession of the mortgagor. [See 2 *Mass. R.* 496, *Erskine vs. Townsend*.] This method of setting forth a deed with a *profert*, has been more generally adopted in our practice than the other. See *Am. Precedents*, 3d. ed. p. 354, 355. But it is liable to objections, not only on account of its unnecessary length, and limited use; but because it is less simple than the other in its form, and bears but little resemblance to real actions. In its structure, indeed, it is more like an *action of covenant*, or *on the case*, than a *writ of Entry*.

It has been said in one case, that by the statute, the mortgagee or assignee of the mortgage, after the condition is broken, can have only a *conditional judgment*, "to recover his seisin, unless the money due, with the interest and costs, shall be paid within two months;" (*Stat.* 1785, ch. 22, § 1; 2 *Mass.* [255] *R.* 493, *Erskine vs. Townsend*.) and that from hence arises the necessity of the demandant's alleging that he was seised *as mortgagee*, so as to bring his case within the statute. For it has long been held, (it is there said,) by our courts, that if the mortgagee declares *generally* upon his own seisin, and a disseisin by the mortgagor, the latter may plead *in bar* that the demandant was seised as tenant *in mortgage only*, the condition

of which was broken before the commencement of the suit; and that such a plea will defeat the demandant's action. *Ibid.* 496, 497.

It is not very obvious upon what ground it could ever have been held, that this exception was matter *in bar*, even admitting that it might be pleaded in *abatement*. But the law, as laid down by the Chief Justice in that case, has since been doubted, if not overruled. 13 *Mass. R.* 519, *Green vs. Kemp*. And the court seem to have considered, that as the mortgagee might, *before condition broken*, have judgment for possession at *common law*; there was no good reason why he might not have the same judgment, *after* condition broken, when the object of the suit was not merely to foreclose the mortgage. For such a judgment could not prejudice the interests of the mortgagor: since he may redeem at any time. And if the mortgagee should refuse to receive the money, he might be considered in possession for condition broken, at the election of the mortgagor, so as to entitle him to his bill in equity to redeem. *Ib.*; and see 12 *Mass. R.* 519, *Pomeroy vs. Winship*; 15 *Mass. R.* 487, *Patridge et ux. vs. Gordon*.

A mortgagee of the remainder or reversion, after an estate for life, may maintain his writ of Entry to foreclose, during the life of the particular tenant. For between mortgagor and mortgagee, it is no answer to an action by the latter to foreclose, that the former is not tenant of a *freehold* in possession. The par-
[256] ticular tenant cannot be affected by such a recovery. And there is no reason why the mortgagee of a remainder or reversion should not be permitted, as soon as there is a breach of the condition, to bring his suit to foreclose. 13 *Mass. R.* 430, *Penniman vs. Hollis*.

The mortgagor being considered only tenant at will to the mortgagee,* the latter may assign the mortgage without making an entry. 8 *Mass. R.* 566, *Reading of Judge Trowbridge*. And when the mortgage is assigned, either by endorsement, or a separate instrument, the assignee is put in the place of the mortgagee, to every purpose, unless a different intention appears. 12 *Mass. R.* 30, *Hills vs. Eliot*.

It has been a common practice for assignees of mortgages, in actions brought by them to foreclose, to set forth each assignment specially, and with a *profert*. *App.* 37, a; and see *Am. Precedents*, 3d. ed. p. 355. This has probably happened from a supposed analogy to actions of covenant or debt, by the assignee of the *reversion*, against the *lessee* or his *assignee*. The supposed analogy however does not exist. And the concise form before referred to, in which the demandant counts generally upon *his own seisin in fee and in mortgage*, (*App.* No. 34,) seems to be equally proper, whether the demandant is *mortgagee* or *assignee*.

But where the other form is adopted, in an [257] action by the assignee of a mortgage, his setting forth the deed to the mortgagee *specially with a profert* renders it necessary to set forth *all the assignments* also, in the same manner. *App.* No. 37, a.

Though the mortgagor remains in possession, after the execution of the mortgage, it is no disseisin of the mortgagee, *but at his election*. Consequently he may convey the mortgaged lands to a third person, who will

* If the mortgagor of land, being in possession, cut down and carry away timber-trees, growing on the mortgaged premises, it has been held that he is liable to the mortgagee, in an action of trespass *quare clausum fregit*, for their value. 2 *Greenl.* 387, *Stowell vs. Pike & al.*

thereupon be seised of the *legal estate, subject to the condition* contained in the mortgage. Such a conveyance is not a mere assignment of a *chose in action*, but an alienation of the legal estate. [But where a stranger, by taking possession of the land mortgaged, disseises the mortgagor, he disseises the mortgagee also : it follows therefore, that so long as the disseisor continues in possession, the mortgagee cannot, by his deed, pass his interest in the land. 8 *Pick. R.* 272, *Poignard vs. Smith*. Consequently the action against such *disseisor*, or any one who has acquired the seisin under him, must be brought in the name of the *mortgagee*.]

After an assignment of the mortgage, the *mortgagee* has no longer any right or interest in the mortgaged premises. It necessarily follows, that the assignee must now bring the suit to foreclose, and the mortgagee can no longer maintain an action for that purpose, or even to recover seisin of the lands *before* condition broken. And if he attempts to bring such an action, his alienation of the mortgaged premises may be *pleaded in bar*. 6 *Mass. R.* 241, *Gould vs. Newman*.

[If, after the sale of the mortgagor's right of redemption on execution, the mortgagee convey all his interest in the land to the mortgagor, such conveyance will operate as an assignment, and not as an extinguishment of the mortgage. 4 *Pick. R.* 505, *Barker & al. vs. Parker & al.* Such mortgagor therefore, in character of assignee, may maintain his writ of Entry to foreclose, against the purchaser, or any holder of the equity of redemption. But if the mortgagor, at the time of such conveyance to him by the mortgagee, be seised of the equity of redemption, the mortgage will be extinguished. *Ib.* If a writ of Entry to foreclose be brought against the mortgagor, *after* he has assigned his right

to redeem, or it has been taken from him and sold on execution, he may plead a disclaimer in bar of the writ, if he is not in actual possession. 7 *Pick.* 31, *Olney vs. Adams & al.*]

Where the *bond*, to secure the payment of which the mortgage was given, is *assigned* with it, the assignee will be entitled, in his action to fore- [258] close the mortgage, to have the conditional judgment entered in *his own name*, although a judgment may have been before obtained upon the bond, in the name of the obligee. 6 *Mass. R.* 242.

[Where a mortgage was made, as collateral security for a negotiable note, and the note was negotiated separately, without any assignment of the mortgage, it was held that the equity of redemption might be attached in a suit by the indorsee against the promissor, and sold on execution. And notwithstanding the separation of the note from the mortgage, still the mortgage remained in force; and according to the principles adopted by courts of equity, the mortgagee was to be regarded as a trustee for the benefit of the holder of the note. 4 *Pick. R.* 130, *Crane vs. March.* And see 8 *Pick. R.* 490, *Cutler vs. Haven.*]

If a mortgagee or the assignee of a mortgage *dies* before the mortgage is *foreclosed*, not only the debt belongs to the *executor* or *administrator*, to be administered according to law; but the mortgage also, (which is only a security for the debt,) goes with it. And by the statute of 1788, ch. 51, § 1, before referred to, the executor and administrator are expressly authorized to bring actions for the recovery of lands and tenements, mortgaged to the *testator*, or *intestate*, in which case it shall be sufficient to declare upon *their seisin*.

It follows, therefore, that the *heirs of the mortgagee*, as such, have no right or interest in the mortgage, which will entitle them to *enter*, or to *maintain a writ of Entry*, for the purpose of foreclosing. 16 *Mass. R.* 21, *Smith vs. Dyer*.

But if the mortgagee has taken possession, and the term of redemption has expired in his lifetime, his estate therein is of course become absolute, and descends to his heirs, like his *other real property*, over which the executor has no control, except a mere *power to sell*, if necessary, for the payment of debts. 4 *Mass. R.* 359, *Drinkwater vs. Drinkwater*.

[259] Whether, if the mortgagee has *taken possession*, by entry or action at law, for condition broken, and dies before the time of redemption has elapsed, the *heirs*, upon whom the seisin is cast, shall bring any action which may become necessary, does not appear to be decided.* It seems however, that in such a case the *executor* might discharge the mortgage; and if the *heir* should receive the money, and give a discharge, he would be a *trustee* for the benefit of the executor, or rather of those who were entitled to the personal estate. For until foreclosure, the mortgaged estate is to be considered in law as a pledge for the debt; and upon the decease of the mortgagee, it is to be treated in every

* Since the former edition of this work was published, it has been determined, that where the mortgagee had entered for breach of the condition, and consented by *parol*, that the mortgagor might continue in possession, *paying interest*, until the mortgage should be foreclosed or redeemed, and then died: an action, *before foreclosure*, to recover the actual possession, must be brought by the executor or administrator, and could not be maintained by the heir. 4 *Pick. R.* 19, *Devey vs Van Deusen*. The doubt therefore, which was suggested in the text, may now be considered as resolved by the court.

respect as a *debt*, by the executor or administrator. 16 *Mass. R. 22, 24, Smith vs. Dyer.*

An executor or administrator, *appointed here*, may not only maintain an action to foreclose a mortgage to the testator or intestate, and discharge it upon receiving the amount of the debt; he may also *assign* both the mortgage, and the debt it was intended to secure. But it has been decided that an administrator deriving his authority from an appointment in *another state*, cannot assign a mortgage of land situated in this state, or maintain a writ of Entry to foreclose such a mortgage. 1 *Pick. R. 81, Cutter vs. Davenport.*

When a writ of Entry to foreclose a mortgage, [260] is brought by an executor or administrator, it is proper to aver his right, in that capacity, to hold the demanded premises in mortgage. But it is not usual or necessary in *our practice* to make *profert* of the *letters testamentary* or of *administration*, or even to aver expressly the *probate* of the will. See *App. No. 35, 36.* And if the tenant would draw in question the authority of the demandant to sue in character of *executor* or *administrator*, he must do it by a proper plea, which it seems may be either in *abatement* or in *bar*. 11 *Mass. R. 313, Langdon vs. Potter.*

If a mortgage is made or assigned to a *trustee*, the action to foreclose must be brought by him, or his assignee; and cannot be maintained by *cestui que trust*. 16 *Mass. R. 356, Somes vs. Skinner; Ante, p. 41.*

SECT. XXVI. The action by a mortgagee to recover possession, for the purpose of foreclosing the mortgage, is founded upon statutory provisions; and is not in all respects conformable to the general principles, applicable to real actions. The title to the freehold is not determined in such an action. It is *not necessary*, therefore,

that it should be brought against him who is tenant of the freehold. Any person *in possession* of the mortgaged premises, who does not claim by title *paramount to that of the mortgagor*, is liable to the action of the mortgagee. 11 *Mass. R.* 216, *Keith vs. Swan*; [*Ante*, § 18.] And where the mortgagee or his assignee recovers judgment against a stranger, the court will render a *conditional* judgment. 3 *Pick. R.* 53, *Somes, Admr. vs. Skinner*.

If the mortgagor assign the right in equity to redeem, to several persons as tenants in common, and they resist the entry of the mortgagee, or compel him to resort to an action to foreclose, each assignee may be considered as a *deforciant of the whole*. For in a writ of Entry to foreclose a mortgage, when brought against the *assignee of the mortgagor*, the demandant generally counts against the assignee as the *immediate wrongdoer*, that is in the *QUIBUS*; and not in the *PER*, as coming in *by* the mortgagor. Because the assignee of the mortgagor must hold *subject to the mortgage*, since he has only a right to redeem; and his title, (though lawful against every one else,) is entirely subordinate to that of the mortgagee and his assigns.

But if two distinct closes are included in the same mortgage, and the mortgagor conveys each of the closes in fee to a *different* person, by whom they are held in *severalty*, the mortgagee, in order to foreclose, must have a writ of Entry against *each*. Because in such a case, each grantee of the mortgagor would hold his part in *severalty*, and therefore each would be a *several deforciant*. 7 *Mass. R.* 357, 358, *Taylor vs. Porter*.

[262] A *second* or *third* mortgage in fee of the same lands is good, as *between the parties*, although nothing passes by it, but the *equity of redemption*. And

where there are several mortgages of the same land, a subsequent mortgagee is entitled to have the possession, and to take the profits, as against the *mortgagor*, subject only to the rights of *prior mortgagees*. In these cases, if the *mortgagor* refuses to redeem, a *subsequent* mortgagee may redeem from the *prior* mortgagees. 3 *Mass. R.* 138, *Newall vs. Wright* : [And See 5 *Greenl.* 272.]

[If an equity of redemption is sold on execution, and the mortgagor was seised at the time of the sale, the deed of the officer to the purchaser, will give him a seisin *in fact*, and not merely a seisin in law; consequently he may maintain a writ of Entry against the mortgagor or a stranger, *without first making an entry*. But if the mortgagor is disseised at the time of the sale, the deed of the officer will convey *no seisin*; but it will give a *right of entry*, so that the purchaser, *after making an entry*, may maintain a writ of Entry, counting on his own seisin. 6 *Pick. R.* 172, *Poignard vs. Smith*.]

It is a good defence to a writ of Entry to foreclose, that the mortgage was given to secure an usurious contract. And this defence may be made by a plea, to be verified by the *oath of the party*, or proved by other evidence. See 17 *Mass. R.* 365, *Adams vs. Barnes*; [*App. No.* 38.]

But if this defence is set up by a mortgagor, to a writ of Entry brought by the mortgagee in order to foreclose, and the mortgagor, failing to make out his defence, has judgment against him, and *then* grants and releases all his interest in the mortgaged premises to a third person; if the latter brings his writ of Entry to recover the premises against the mortgagee, the former judgment will be an *estoppel*, which will preclude the demandant from giving evidence of the usury. [263] And the tenant, it seems, may avail himself of

the estoppel without pleading it. *See* 17 *Mass. R.* 365, *Adams vs. Barnes*. It is proper to observe here, that a mortgage, made upon an usurious consideration, is void only against the mortgagor, and those who lawfully hold the estate under him. And a purchaser of the equity of redemption cannot avoid the mortgage, upon the plea or proof of usury. As his purchase is only of a *right to redeem*, if he does not incline to avail himself of that right, which is the *only basis* of his title, he cannot have the land. 13 *Mass. R.* 519, *Green vs. Kemp*.

Payment of the mortgage debt, or tender of the money, *before condition broken*, and a refusal by the mortgagee, is a good plea to this action; for it discharges the land, which was pledged by the mortgage, though the debt remains. *Co. Litt.* 209; *Powell on Mort.* 7, 8; 14 *Mass. R.* 104, *Darling vs. Chapman*; *App. No.* 39. [But the tenant cannot plead a tender made *after* condition broken, and *before* action brought; nor, that after condition broken, and before action brought, the mortgagee promised him that he should hold the land discharged of the mortgage. 5 *Pick. R.* 240, *Maynard vs. Hunt*. And it seems that the tender in this case should be *unconditional*, as it is required to be, where a mortgagor would redeem his equity of redemption, which has been attached by his creditor, and sold on execution. *See* 3 *Pick. R.* 48, *Loring vs. Cooke*.]

If the mortgagee has given up the original security, and taken another, even of a higher grade, it will be no defence to an action to foreclose the mortgage. For the mortgage and the personal security are distinct. And by the terms of the contract, nothing but *payment*, or *tender and refusal* of the debt, will discharge the mortgage. 9 *Mass. R.* 247, *Davis vs. Maynard*; 7 *Mass. R.* 63, *Carey vs. Prentiss*.

[Where the principal debtor executed a mortgage to his creditor, conditioned for the payment of a note, signed by himself and his surety, and the surety afterwards paid the debt, and took from the mortgagee an assignment of the mortgage for his better security; it was held that the payment of the note was no extinguishment of the mortgage, and that the surety might enter and hold the land in mortgage for his debt. 2 *Greenl.* 341, *Norton vs. Soule*. It may be added, that taking possession of the mortgaged estate, for the purpose of foreclosing, does not operate as a payment of the mortgage money, for the land still remains only a security for the money. 8 *Pick. R.* 336, *West vs. Chamberlin*.]

If the mortgagee, or assignee of the mortgage [264] has deceased, the tender should be made to the executor or administrator, and not to the heirs. 13 *Mass. R.* 311, *Scott vs. McFarland*.

It has been already mentioned, that after making the mortgage, the mortgagee, if there is no *proviso* to the contrary, may immediately enter, or commence his writ of Entry, without waiting until there is a breach of the condition. *Ante*, p. 39, 41; [and 2 *Greenl.* 132, *Blaney vs. Bearce*.] This *improvident* practice of putting the mortgagor entirely at the mercy of the mortgagee, (if from motives of oppression or caprice he is inclined to turn him out of possession,) is very common in our country, and in some parts of it almost universal. It seems to be the uniform practice in *England*, to provide by an express covenant, that the mortgagee shall not enter, or disturb the mortgagor, until a breach of the condition is incurred. This is a very proper precaution on the part of the mortgagor; since, if the *deed* contains no such stipulation, the mortgagor is without re-

dress ; because *parol evidence*, that it was agreed, at the time of executing the mortgage, that he should continue in possession until there was a breach of the condition, is not admissible. 16 *Mass. R.* 89, *Colman vs. Packard* ; 5 *Greenl.* 89, *Bean vs. Mayo & al.*

SECT. XXVII. It will not be necessary to [265] remark upon the judgment *for the tenant*, in writs of Entry brought upon a mortgage. It follows of course, where the demandant is nonsuited, or has a verdict against him, in the same manner as in other writs of Entry. But when judgment is to be entered for the demandant, the statute, (1785, ch. 22, § 1,) interposes, wherever it appears, either from the demandant's writ, or the plea of the tenant, that the title of the former is only to hold as *mortgagee*, or *assignee* of a *mortgage*, and not as absolute owner of the fee. The statute, (which extends to all contracts with a *penalty*,) provides that "when the forfeiture, breach, or non-performance, shall be found by the jury, by the default, or confession of the defendant, or upon demurrer, the court before which the action is, shall make up judgment therein for the plaintiff, to recover so much as is due in equity and good conscience. But the judgment shall be *conditional*, that if the mortgagor or vender, his heirs, executors, or administrators, shall pay unto the mortgagee or vendee, his executors or administrators, such sum as the court shall adjudge due, within *two months* from the time of entering up judgment, with interest, then the same mortgage or deed of bargain and sale shall be void and discharged ; otherwise the plaintiff shall have his writ of possession."

[266] Under this statute, whenever the mortgagee is entitled to judgment, the court will liquidate the sum due upon the mortgage, and enter the *CONDITION-*

AL JUDGMENT, that he have seisin, *unless* the mortgagor pay *that sum* with interest, and the costs of suit, within two months. And if the mortgage was given as collateral security for the payment of a bond, the conditional judgment will be for the amount of principal and interest due, although the sum may *exceed* the penalty of the bond. 2 *Mass. R.* 118, *Pitts vs. Tilden*.

Nothing but *payment of the debt*, secured by the mortgage, will prevent the mortgagee's having judgment for seisin of the mortgaged premises. Therefore, it was held to be no defence to such an action, that the mortgagor had been charged as *trustee of the mortgagee*, in a process of *Foreign attachment*, on account of the same debt, for the security of which the mortgage was given; that in consequence of that judgment, an execution had issued against him, upon which he had been imprisoned, and afterwards discharged upon taking the *poor debtor's oath*: and furthermore, that since his discharge the judgment creditor had released to him the judgment. 7 *Mass. R.* 63, *Carey vs. Prentiss*; and see 9 *Mass. R.* 242, *Davis vs. Maynard*.

[And where a mortgage was given to secure the payment of a promissory note, and the assignee of the mortgage took a new note from the mortgagor, in exchange for the old one, it not being intended as payment; it was held that the mortgage debt was *not thereby paid*, but the mortgage remained good, as security for the amount due on the new note, as against the mortgagor. 8 *Pick. R.* 522, *Watkins vs. Hill*.]

But where the mortgage is given to secure [267] the payment of several sums of money at different times, or the performance of several future acts; if a breach of the condition is confessed or found by the jury, the court will ascertain the *arrears*, or liquidate the

damages already incurred, and at the prayer of the mortgagor, the conditional judgment may be entered for that sum, and the mortgage will still remain a security against future breaches. 15 *Mass. R.* 262, *Wilder vs. Whittemore*.

[And where the mortgagee enters for the breach of one condition, (there being several,) the mortgagor, by tendering performance of the condition which has been broken, may prevent a foreclosure: and upon a bill in equity, he will be entitled to judgment for possession, unless the mortgagee sets up, in answer to the bill, his general right under the mortgage; or alleges that he holds for a breach of *another condition*. In that case, a special decree may be made, by which the mortgagor may be relieved from the effects of the breach, for which the entry was made, and still leave the mortgagee in possession of all his legal rights. 5 *Pick.* 259; *Saunders & al. vs. Frost*.]

It has been already observed, (*Ante*, p. 234,) that if two distinct closes are included in the same mortgage, and the mortgagor conveys the closes to *different persons*, by whom they are held in severalty, the mortgagee, in order to foreclose, must have a writ of Entry against each. But it should be here remarked, that the mortgagee in such a case shall have judgment on *each writ*, unless *the whole* mortgage debt is paid. For each close is liable for the whole amount due on the mortgage. If the grantee of either close should pay the money, such payment would be a discharge of the other. And in all cases where there are two or more grantees under the same mortgage, (whether in severalty, or as tenants in common,) if one should pay off the whole, or [268] more than his proportion of the mortgage, there seems to be no doubt that the others would be held

held to a reasonable contribution. 7 *Mass. R.* 355, *Taylor vs. Porter*.

When the tenant in a writ of Entry upon a mortgage suffers judgment to be rendered upon default, if the condition is for the payment of money only, and the amount due can be ascertained by a computation of interest, *the clerk* will enter the conditional judgment of course, without any particular direction from the court. But if the condition is for the performance of some specific act, or to indemnify the mortgagee, and the like, unless the amount is agreed by the parties, it must be liquidated by *the court*, or ascertained by a jury, or by an auditor or assessor under its direction. Upon default it will not be necessary to file the original deed; the clerk having authority in such a case, to enter the conditional judgment upon filing a copy of the mortgage. 14 *Mass. R.* 362, *Union Bank vs. Thayer*. [And a copy may also be used on the trial, where the original mortgage has been lost, or destroyed, or is beyond the control of the demandant; which fact may be proved by his own affidavit. 8 *Pick. R.* 272, *Poignard vs. Smith*.]

It only remains to add, that the tenant in a writ of Entry upon a mortgage, will not be entitled to have the *conditional judgment* entered in every case. When the action is brought, *not to foreclose*, but for the purpose of obtaining possession of the mortgaged premises, the demandant, as was before intimated, may count upon his own seisin generally, as in a writ of [269] Entry in the *Quibus*. In such a case he will be entitled to an *absolute* judgment against every person but the mortgagor or his assignee, having a right to redeem. And even against them he will be entitled to the same judgment, unless by a proper plea they set

forth their interest, with a prayer that the conditional judgment may be entered. In that case, if it appear that the mortgage has been forfeited by a breach of the condition, the court will render a *conditional* judgment. For after forfeiture, the mortgagor, or party entitled to redeem, has a right to consider the entry of the mortgagee to be for condition broken, (although he makes no declaration to that effect,) and consequently to bring their Bill in equity to redeem. 12 *Mass. R.* 514, *Pomeroy vs. Winship*. The court therefore, with a view to save the expense of a suit in equity, will allow the party entitled to redeem, to avail himself of that right, in the action brought by the mortgagee to recover possession. 15 *Mass. R.* 487, *Partridge vs. Gordon*.

[By a late statute, (1828, ch. 137, § 7,) it is now provided, that whenever a general action upon disseisin shall be brought by a mortgagee, his executors, administrators or assigns, for the recovery of the mortgaged premises after condition broken, and the tenant, pleading the mortgage, shall pray that a *conditional judgment* may be rendered, the demandant, in case the action be not brought for the purpose of foreclosure, and such conditional judgment, if satisfied, would not be a satisfaction of the mortgage, may have judgment as at *common law*. *Provided, however*, that nothing herein contained shall impair the right of the tenant to consider the entry under the last mentioned judgment, an entry *for condition broken*.]

Where the demandant counts upon his own seisin generally, even *after condition broken*, and the tenant pleads the *general issue*, or any other plea which *does not admit* the demandant's title to hold the estate *as mortgagee*; if the latter obtains a verdict, he will [270] be entitled to a *general judgment* that he recover

his seisin. It seems, indeed, that it is only by admitting in his plea the title of the demandant, alleging a breach of the condition of the mortgage, and averring his own right *to redeem*, that the tenant can restrict the demandant to a conditional judgment. 13 *Mass. R.* 520. *Green vs. Kemp*. It is said, however, in one case, that the tenant might read *in evidence a defeasance*, to shew that the demandant in a writ of Entry was entitled only to a *conditional judgment*, as upon a suit to foreclose a mortgage. The ground of this opinion seems to have been, that in *Chancery*, whenever it appears from *written evidence*, that the land was conveyed as a *pledge* for the payment of money, the conveyance will be treated as a mortgage. It is not expressly said, whether a defeasance may be thus given in evidence under the general issue, or a *special plea*. If it is only intended to assert, that such evidence is admissible under a special plea, "that the demandant held as mortgagee, and that the condition of the mortgage was broken," it is unquestionably correct. But if it is meant that such evidence should be received under the *general issue*, (which was the only plea in the case in question,) it is not easy to perceive upon what grounds the opinion can be supported. It ought however to be observed, that it is to be regarded rather as an *obiter dictum*, than [271] the judgment of the court: because it forms no part of the grounds upon which the cause was decided. 4 *Mass. R.* 444; *Kelleran vs. Brown*.

[If it appears that the debt secured by a mortgage has been paid, the mortgagee, in a writ of Entry founded on his deed, cannot have judgment for possession of the land. 2 *Greenl.* 322, *Vose vs. Hardy*.]

SECT. XXVIII. There is also another case in which an *executor or administrator may, in our practice, main-*

tain a writ of Entry. It is where, upon the recovery of a judgment by them, execution is levied upon the land of the judgment debtor. In this case, after the sheriff has completed the levy, and delivered seisin to the executor or administrator, if the judgment debtor refuses to give up the possession; or if a stranger enters and disseises them, they may maintain their writ of Entry. This remedy, though not *expressly* given, is considered as implicitly authorized by the third section of the statute 1788, ch. 51, § 3, before referred to. It provides "that whenever any executor or administrator shall recover judgment for any sum of money, whereon execution shall issue, and lands, tenements, or hereditaments, shall be set off to said executor or administrator, in discharge of the said execution, the said executor or administrator shall be seised and possessed of the whole estate in the lands, tenements, or hereditaments so set off, to the sole *use and behoof* of the widow and heirs of the deceased intestate, or of the residuary legatee or legatees of the testator, as the case may be."

[272] In construing this statute, it has been contended that the word *use* must have its technical sense; it being a general rule, that words used in former statutes, which have acquired an established meaning, should, in a subsequent statute, be understood in the same sense. *See 4 Mass. R. 605.* It has accordingly been argued, that when an executor or administrator levied an execution upon real property, and received seisin from the sheriff, he became seised of *such* an use, as was executed by the *statute of uses*. 27 H. VIII. ch. 10. But the court, taking into consideration the other provisions, and the general object of the statute, considered the intention of the legislature to be mani-

fest, that the executor or administrator should take the estate, *not as an use* which the statute of uses would execute, but *in trust*, for the benefit of the widow and heirs, until it should be distributed by the court of probate, or at least, until it should be ascertained whether the land levied upon would be wanted to discharge debts and legacies, or defray the expenses of the administration.

This construction, it was observed, seems to be necessary, in order to make the several provisions of the statute consistent with each other. For the fourth section provides, that if the *debtor*, his heirs, executors, or administrators shall redeem the estate [273] which has been levied upon, the executor or administrator of the *creditor* shall receive the money, and discharge the land by release, or other legal conveyance. But if the estate levied upon was *an use*, which would be immediately executed by the statute of uses, so as to vest the legal estate in the heirs, it would be absurd to direct the executor or administrator, (in whom no estate would be left,) to execute the discharge. 4 *Mass. R.* 598, *Boylston vs. Carver*.

In this action the executor or administrator should count upon his own seisin, *in the capacity in which he obtained the judgment*. In other respects it seems the form of the writ should be the same as in other writs of Entry. 5 *Mass. R.* 241, *Willard vs. Nason*; *App. No.* 40. And not only the pleas on the part of the tenant, but the evidence, verdict, and judgment also, will be the same, as if the demandant had recovered the judgment, levied the execution, and brought his writ of Entry *in his own right*. No further remarks, therefore, seem necessary in relation to this action.

CHAPTER V.

Writs of Dower and the Proceedings therein.

[274] **SECT. I.** **DOWER** is the provision made by the law, upon the death of the husband, for the support of the wife out of his estate, during her life. It is an institution which probably had its origin among the ancient *Germans*; and was brought by them into the southern parts of *Europe*. For as early as the time of *Tacitus*, it was an established custom among the *German* nations, that the wife should bring no portion to the husband; but that the husband should allot a part of his property for her maintenance, if she should survive him. "*Dotem non uxor marito, sed uxori maritus offert.*" *Tacitus de Mor. Ger.* 18.

It has been supposed that among the *Saxons*, the only provision made for the support of the wife, after the death of the husband, was out of his personal estate. And Sir *Martin Wright* has remarked, that "we find no footsteps of dower in *lands*, until the time of the *Normans*. But on the contrary, provision is made [275] by one of the laws of the Saxon king *Edmund*, for the support of the wife surviving the husband, out of his *goods only*." *Tenures*, 193. This seems however to be a mistake; for there is an ancient *Saxon* charter in the appendix to the *Treatise on Gavelkind* by Mr. *Somner*, with the title of "*Chirographum per-vetustum de nuptiis contrahendis, et dote constituenda,*"

in which particular *lands*, together with a certain number of oxen, cows, horses, and *bond-men*, are appropriated for the dower of the wife.

By the ancient customs of *Normandy*, the wife was entitled for her dower to one third part of the *fief* of which the husband was seised *at the time of the marriage*. The husband could not endow his wife of *more* than a third part of his lands, though he might of *less*. *Grand. Coust.* ch. 101. And this seems, according to *Glanville*, to have been the law of *England*, at the time he wrote, in the reign of Henry II. But there were two methods of making the endowment; either by naming the particular lands, at the time of the marriage, of which the wife was to be endowed, or by endowing her *generally of all his lands*. And to this the husband was bound, by the *ecclesiastical* as well as the *secular law*.*

At first, it seems that dower was forfeited, not [276] only by incontinency, but by a second marriage. But in the time of Henry I. this condition was restricted to cases where there was issue of the husband. *Black. Tracts*, 286.

* Dos duobus modis dicitur : dos enim dicitur vulgariter id, quod aliquis liber homo dat sponsæ suæ, ad ostium ecclesiæ, tempore desponsationis suæ; teneter autem unusquisque, tam jure ecclesiastico, quam jure seculari, sponsam suam dotare tempore desponsationis. Cum quis autem sponsam suam dotat, aut nominat dotem, aut non. Si non nominat, tertia pars totius tenementi liberi sui, intelligitur dos ejus, et appellatur rationabilis dos cujuslibet mulieris tertia pars liberi tenementi viri, quod habuit tempore desponsationis, ita quod fuerit inde seiscitus in dominico. Si vero dotem nominat, et plus tertia parte, dos ipsa in tanta quantitate stare non poterit: amensurabitur enim, usque ad tertiam partem, quia minus tertia parte, scilicet tenementi sui, potest quis dare in dotem, plus autem non. *Glanv.* lib. VI. ch. 1; [*See 1 Reeves' Hist. E.L.* 100.]

Though the *general law* of dower was thus early established, there were also *local customs* in particular districts by which the wife was entitled to a different portion of the husband's property. By the custom of *Gavelkind* the wife was endowed of a *moiety* of all the lands the husband held *by that tenure*, subject however to the forfeiture before referred to, in case of incontinency, or a second marriage. *Rob. Gav.* 159. And by the custom of *Burrough English* the wife was entitled to hold *the whole* of her husband's lands in dower. *Litt.* [277] § 37, 166. These usages clearly indicate a different origin from the *customary law of Normandy*, though that was generally established.

The necessity of this provision for the wife will appear very manifest, when the principles of the ancient law are considered. Before the introduction of *trusts*, the husband could give nothing to his wife in his lifetime; and until the reign of Henry VIII. he could not devise his lands to her. *Stat. of Wills*, 32 H. VIII ch. 1. He might, it is true, make a testamentary disposition of his *personal property* in her favour. But in the early times of the *common law*, to which we now refer, the personal property, even of the most opulent, was comparatively trifling. Without this *general provision* therefore, she would have been left destitute, unless she had been *specially endowed* in some of the ancient modes, at her marriage.

The right of dower ought to be regarded not only as a *civil*, but emphatically a *moral right*. This view of it has been clearly stated and powerfully enforced by Sir *Joseph Jeckyl*, in the case of *Banks vs. Sutton*. 2 P. W. 702. "The relation of husband and wife," he observes, "as it is the *nearest*, so it is the *earliest*, and therefore the wife is the proper object of the care and kind-

ness of the husband. The husband is bound by the law of God and man, to provide for her during his life : and after his death, the *moral obligation* [278] is not at an end, but he ought to take care of her provision during her own life. This is the more reasonable, as during the coverture, the wife can acquire no property of her own. If before her marriage she had a real estate, this by the coverture ceases to be hers, and the right thereto, whilst she is married, vests in the husband ; her personal estate becomes his absolutely, or at least is subject to his control. So that unless she has a real estate of her own, (which is the case but of few,) she may, by his death, be destitute of the necessities of life, unless provided for out of his estate, either by a *jointure* or *dower*. As to the husband's personal estate, unless restrained by special custom, (which very rarely takes place,) he may give it all away from her ; so that his real estate (if he had any,) is the only *plank* she can lay hold of, to prevent her sinking under her distress. Thus is the wife said to have a *moral right* to dower."

Of the several species of dower mentioned by *Littleton*, (§ 48, 49,) only one has been adopted here, which is usually denominated *Dower at the common law* ; though with us it has been established, and the proceedings in relation to it are in a great measure *regulated, by statute*. In a considerable portion of our country the principles of the common law upon this subject have been very little departed from, either [279] as to the *extent of the right*, the *remedy* by which, in ordinary cases, it is enforced, or the *conditions* and *restrictions* to which the right is subjected. But in some of the states, important innovations have been made. These alterations, the limits prescribed to this *summary* do not allow us to notice particularly. We

shall therefore only observe, that the greatest departure from the rules of the common law, upon the subject of dower, will perhaps be found in the statutory provisions of *Vermont* and *Georgia*; in both of which states, the widow, whose husband has died *without issue*, may elect, *instead of her dower* at the common law, to receive a *moiety* of the residue of the husband's real and personal estate, after his debts are discharged, to her own use *forever*.

SECT. II. [By a statute of the colony of *Massachusetts*, as early as 1641, widows were allowed their dower, who had not been provided for by a jointure in lands and houses, for term of life. This dower was to be "one third part of all such houses, lands, tenements and hereditaments, as her husband was seised of to his own use, either in possession, reversion or remainder, in any estate of inheritance, or of *frank tenement not then determined*, at any time during the marriage," for their natural lives, *free of all debts and charges*, made by the husband, otherwise than by some act or consent of the wife, signified *by writing under her hand*, and acknowledged before some magistrate. And it contained also a *proviso*, "that every such widow, so endowed as aforesaid, shall not commit or suffer any strip or waste; but shall maintain all such houses, fences and enclosures, as shall be assigned to her for her dowry, and shall leave the same in good and sufficient reparation in all respects." *Colony charters, &c.* 99. In the *stat.* 8 *W.* III. ch. 36, providing for the distribution of insolvent estates, there is an express saving of the dower of the wife. And by *stat.* 13 *W.* III. ch. 76, general provision was made for the assignment of dower, very nearly the same as by the now existing law.]

What estate in the husband shall be necessary to entitle the wife to dower, is not determined by our statutes. By the revised statute of descents, (1805, ch. 90, § 1, and *see stat.* 1783, ch. 36, § 4,) there is an express saving to the widow of "her dower at the *common law*, unless she be lawfully barred of the same." And the *general rule* of the common law is, that where the husband is seised of lands or tenements in *FEE SIMPLE*, *FEE TAIL GENERAL*, or *AS HEIR IN SPECIAL TAIL*, during the marriage, the wife, at his decease, is entitled to dower. *Litt.* § 36.

[The rule of law, as generally applicable to our practice is, that "where a man is seised of such an inheritance, that the issue which he may have by his wife may, by any possibility, inherit such estate, as heir to him, such wife shall be endowed of a third part thereof in severalty." But of a remainder or reversion on a freehold, the wife was not dowable at common law. For although such an interest is descendible or transmissible to the heirs of the person to whom the remainder is limited, or the reversion belongs, equally with an estate vested in possession; and a person is sometimes said to have a *seisin in law*, of such remainder or reversion, thus expectant upon an estate of freehold: yet, by the term *seisin*, as applied to such remainder or reversion, it is only meant that the property or interest is fixed in the remainder-man or reversioner. The particular estate of freehold, and the remainder or reversion, constitute in law but *one estate*, and the *seisin* is strictly in the particular tenant, though it may be considered as extending to all.]

[By the statute of the colony above mentioned, it is declared that the wife shall have dower in the lands of which the husband was seised, "either in *possession*,

reversion, or remainder." This was probably always understood to mean a reversion or remainder limited on an estate for *years*, and not on a freehold; and such is understood to have always been the practice.]

[A woman is not dowable of lands, already assigned to another woman in dower. Thus where the ancestor dies, and the lands descend to the heir, who is a married man, and he endows the widow of his ancestor of one third part of the lands which descended to him, and then dies; his widow can have dower only in the remaining two thirds: the maxim of the law being, that *dos de dote peti non debet*. *Co. Litt.* 31, a; 4 *Co.* 121. The reason of this rule is, that the widow of the ancestor is considered as in the estate *by her husband*, by a title prior or paramount to that of the heir; consequently her seisin defeats the seisin of the heir, as to the one third, and he is now considered in law, as never having been seised of it. So, if the heir had been a woman, who endowed her mother, and then married, and had issue, and died in the lifetime of the mother, her husband could not have his curtesy in the lands of which the mother was endowed. 1 *Cruise*, 153.]

[280] But if the seisin of the husband is only *for an instant*, of such a seisin the wife shall not be endowed. *Cro. Jac.* 615, *Ancotts vs. Catherich*; [2 *Co.* 67; *Co. Litt.* 31, b; and see 2 *Bl. Com.* 132, note (y.)]. Therefore, where one conveys lands to the husband in fee, who at the same time, by a deed of the same date, mortgages the land to *his grantor*, the wife of the grantee cannot have dower; for this is all one transaction. The seisin is but for an instant; since by the same act, or at least the same transaction, by which the husband acquired the seisin, he parted with it again. 4 *Mass. R.* 568, *Holbrook vs. Finney*; [15 *Johns. R.*

458, *Stow vs. Tift.*] And where the husband received a conveyance in fee, and at *the same time* mortgaged the estate in fee to a *third person* for the purchase money, and the right of redemption was afterwards foreclosed, it was held that the wife was not entitled to dower, because the seisin of the husband was but for an instant. 14 *Mass. R.* 351, *Clark vs. Munroe.*

So if tenant for life makes a feoffment in fee, his wife shall not be endowed: for although, by making the feoffment, he gained a *tortious fee*, it was but for an instant, and it passed the same moment to the feoffee. *Cro. Jac.* 615. In like manner, if a joint-tenant make a feoffment in fee, his wife shall not have dower; because he was seised of an estate in *severalty* but for a moment, since he passed it to the feoffee, [281] by the same act by which he acquired it. *Cro. Jac.* 615; [*Post.* § 9, 6.] And it is upon the same principle that the wife of a feoffee to uses is not entitled to dower; nor the wife of the conusee of a fine, when by the same fine the estate is rendered back again to the conusor. 2 *Co.* 77, a. *lord Cromwell's case.*

[It is proper to mention, however, that there is a case which may seem to be an exception to the rule, that there can be no dower, where the seisin of the husband is but for a moment. For where, upon the death of the ancestor, the heir has the right of succession, together with the *seisin in law*, his widow, it is said, shall have her dower, though the heir die before entry, and the seisin in law remain in him *but for a moment*. As where lands descend to an heir, *who is married at the time of the descent cast*, and a stranger abates, on the death of the ancestor, and during the possession of the stranger the heir dies, his widow shall be endowed. If the stranger entered *at the instant* that the ancestor

died, he must have entered upon a *vacant* possession, or he could not have abated. And in contemplation of law, the seisin was in the heir, *before* the abatement, though it was but for an instant. But if the heir had *not* been married at the time the descent was cast, and a stranger had abated, and *afterwards* the heir had married, and then died without having regained the seisin, his wife would not be entitled to dower. For by the entry of the stranger, his seisin in law is said to be *rebutted*. He has therefore no seisin, either in fact or in law, *during the coverture* ; *but only a right*. And of a *right* a woman can no more have her dower, than a man can have his curtesy : though a contrary doctrine seems to be held in *Wood's Institutes*. *Co. Litt.* 31, a ; *Perk.* § 366 ; *Plowd.* 137, b ; *Walk. L. D.* 49, 51, 2d. ed. and see *Wood's Inst.* 123, ed. 1738.]

The reason that the wife of a joint-tenant in fee or in tail cannot be endowed out of the joint estate is, because by the death of one joint-tenant, the estate goes to the survivor, who is in *by the first donor*, and therefore by title paramount to that of the wife of the deceased joint-tenant, who is in *by the husband*. *Co. Litt.* 37, b. But since our statute of 1785, ch. 61, which provides that all estates conveyed to two or more persons, shall be *deemed estates in common*, unless it be manifestly *the intention* of the alienor, that they should be held as *joint estates*, very few cases occur, which call for the application of this principle. And when an estate is mortgaged to the husband in fee, the wife will not be entitled to dower, until the mortgage is foreclosed. Neither can she have her dower of a *trust estate*. *Cruise*, Tit. 6, ch. 3, § 32.

By the law of England, where lands are mortgaged *in fee*, the wife cannot have her *dower*, though

the husband is entitled to his *curtesy*, in the [282] *equity of redemption*. But if the mortgage is only for a term of years, the wife shall be endowed. *Cruise*, Tit. 6, ch. 3, § 11. The same doctrine was formerly recognized in *Massachusetts*. 10 *Mass. R.* 366, *Bird vs. Gardner*. But the case of *Snow vs. Stevens*, (15 *Mass. R.* 278,) has shaken, if not overturned the former decisions; and there is great reason to believe, that whenever the question shall come directly before the court, it will be determined that the wife is *dowable* of an equity of redemption, as well where the mortgage is in fee, as when it is only for a term of years. This doctrine has been established in *Connecticut*, upon great consideration. 1 *Conn. R.* 559, *Fish vs. Fish*. And several decisions in *New York*, seem strongly to favour, if they do not indeed fully sanction it. 6 *Johns. R.* 290, *Hitchcock vs. Harrington*; 7 *Ibid.* 277, *Collins vs. Torrey*.

[Since the former edition of this work was published, it has been expressly determined, that a widow is dowable of an equity of redemption in lands, which were mortgaged during the coverture, and in which mortgage she joined with the husband. Her release of dower, it was said, was co-extensive with the mortgage, and extended no further: consequently, the right of dower continued, *subject only to that incumbrance*. 6 *Pick. R.* 416, *Walker vs. Griswold*. If the purchaser of an equity of redemption redeem the mortgage, the widow of the mortgagor will be let in to have her dower, *by contributing her proportion* to the mortgage debt, according to the value of an estate *for her life*, in one third part of the mortgaged premises. And the value of such life estate is to be estimated by the rules for estimating the value of life annuities. 5 *Pick. R.* 146,

Gibson vs. Crehore. But such a right to dower cannot be enforced *by an action at law*, against the mortgagee, or his assignee. It is only by a *bill in chancery*, (under which the equitable extent of the claim of the widow of the mortgagor can be adjusted, and her due proportion of the rents and profits taken into the account,) that her right can be enforced, in a manner that will give her all she is entitled to, without manifest injustice to the party against whom she claims. 3 *Pick. R.* 483, 4, *Gibson vs. Crehore.* And it is not necessary for her to obtain an assignment of dower, to enable her to maintain a suit in equity, for the redemption of the mortgage. 5 *Pick. R.* 146, *Gibson vs. Crehore.*]

SECT. III. At the *common law*, there were three indispensable requisites to entitle the wife to dower; namely, MARRIAGE, SEISIN, and DEATH of the husband. *Co. Litt.* 31, a.

1. There must be a MARRIAGE actually *solemnized* in the manner required by law, between persons capable of contracting; it being an ancient maxim of the common law, "*ubi nullum matrimonium, ibi nulla* [283] *dos.*" [*Bract.* l. 2, c. 39, s. 4.] But it seems that although the marriage may be *voidable*, if it has not actually been avoided in the lifetime of the husband, the wife shall have her dower. *Co. Litt.* 32, a; *Perk.* § 304, 305, 306.

According to lord *Coke*, it is no objection to the wife's claim to dower, that the marriage took place before the parties were of *sufficient age to consent*. For if the wife was more than *nine years old*, at the time of the husband's *death*, she shall be endowed, whatever may be the age of the husband. *Co. Litt.* 32, a.

2. By the common law, a distinction exists between *curtesy* and *dower*, with regard to the kind of SEISIN

necessary to their consummation. If the wife had only a *seisin in law*, the husband could not be tenant by the curtesy, because it was *his own fault* that he had not made an entry upon the lands descended to her. But there was no necessity for a *seisin in fact*, to entitle the wife to dower; because if that were necessary, (as the wife could not enter, and thus acquire a *seisin in fact* for him without his consent,) the husband might *purpose*ly omit to enter, that he might thereby defeat her claim. *Co. Litt.* 31, a.

Therefore if the ancestor die seised, and then his heir also dies, without having entered upon the lands descended from the ancestor, still the wife of the [284] heir shall have her dower. For her husband acquired a *seisin in law*, by the death of his ancestor, without his making an *entry*, which would have been necessary to give him a *seisin in fact*. And though a stranger might have entered, after the death of the ancestor, the wife would still be entitled to dower; for the heir had acquired a *seisin in law*, at the moment of his ancestor's decease, and before the *abatement* of the stranger. But where the stranger *abated before the marriage* of the heir, who afterwards died without making any entry upon the lands descended, the wife of the heir could not have dower. For the *seisin in law*, acquired by the death of the ancestor, was divested by the *abatement*, before the marriage. Consequently there was no *seisin, in fact, or in law*, during the coverture. *Litt.* § 448; *Perk.* § 367; [2 *Prest. Abst.* 403, 4.]

This distinction as to the kind of *seisin* necessary to a tenancy by the curtesy and in dower, is adopted in our practice, and *generally* recognized in this country. But it has been decided in *Connecticut*, that the husband might be tenant by the curtesy of lands, of which

the wife was *disseised* during the *whole period* of the coverture. 4 *Day's R.* 294, *Bush vs. Bradley*.

It should be remembered, however, that though an actual seisin by the husband is not required, to [285] entitle the wife to dower; yet he must have a *present right to be seised*, or she cannot be endowed. Therefore if he has only a *vested remainder*, after an estate for life, his wife cannot have dower, *at the death of the tenant for life*, who had survived her husband. For in this case the husband had *no right to the seisin* during the coverture. 7 *Mass. R.* 253, *Eldredge vs. Forrestal*.

3. The last requisite to the consummation of dower, by the principles of the *common law*, is the **DEATH OF THE HUSBAND**. And this according to *Coke* must be a *natural death*; since what is denominated the *civil death* of the husband, (as becoming a monk,) will not give the wife a right to be endowed. *Co. Litt.* 33, b. But others have contended that if the husband was banished by act of parliament, or by abjuration, (which is a civil death,) the wife should be entitled to dower. See *Jenk. Cent.* 1, case 1.

By the law of *Massachusetts*, the wife's right to be endowed, (not only of the lands of which the husband is seised, but of those which he has aliened also,) may become absolute, even in the *lifetime* of the husband. 14 *Mass. R.* 219, *Davol vs. Howland*. But this is by force of a statute, which provides that when there shall be a divorce for the cause of adultery, *committed* [286] *by the husband*, the wife shall have dower in his lands, in the *same manner* as if the husband were dead. *Stat.* 1785, ch. 69, § 3.

It may be here mentioned, that notwithstanding the general rule of the common law, that the widow is dow-

able of *all the real estate* of which the husband was seised during the coverture; it has been held by our court, that she cannot be endowed of lands in a *wild* and utterly unproductive state. For it would be no advantage to her, since she could make no profit of them, without subjecting herself to an action of waste; and it might be very injurious to the heir or alienee. 15 *Mass. R.* 164, *Conner vs. Shepherd*.

[So where the husband has aliened lands, while they remained in a wild and uncultivated state, the wife will not be entitled to dower, although the lands may have been rendered productive by the purchaser. 1 *Pick. R.* 21, *Webb vs. Townsend*. But of wild lands, used by the husband for the purpose of procuring fuel, and timber for repairs, as an appendage to his house and cultivated lands, the wife shall be endowed. 7 *Pick. R.* 143, *White et ux. vs. Willis*. And it seems that lands which have been *formerly cultivated*, are subject to dower, though they may yield no income, at the time the dower is demanded. 2 *N. Hamp. R.* 56, *Johnson vs. Perley*.]

SECT. IV. ALIENS, by the common law, cannot hold lands in *England*; and are consequently excluded from the privileges of curtesy and dower. 7 *Co.* 25, a. *Calvin's case*. And this ancient principle of the law has been generally, perhaps universally, adopted in this country. In *Massachusetts*, however, this legal incapacity of the *wife*, (who was an alien at the time of her marriage,) to recover her *dower*, has been removed by a late statute, (1812, ch. 94,) but no alteration of the common law has yet been made, in relation to *tenants by the curtesy*.

The rigour of the ancient *feudal law* deprived the wife of an *attainted traitor or felon* of her dower.

[287] er. But this *barbarous policy* of ancient times, which attempted to prevent political, or other offences, by involving the near connexions of the offender in the punishment of his crimes, it has been well observed, IS ABHORRENT TO THE GENIUS AND CHARACTER OF OUR JUDICIAL INSTITUTIONS. For the small number of felonies in our criminal code, *specific punishments* are provided by statute; among which punishments are neither *corruption of blood* nor *forfeiture of dower*. The same character of mildness is a distinguishing feature, not only in the laws of the nation, but in those of most of the individual states. And it cannot be improper to remark here, to the honour of the founders of our state sovereignty, that these humane principles have not been lost sight of in times of the greatest political excitement. For even the widows of those who were denounced by the legislature, (*Act of April 30, 1779,*) during the war of the revolution, as *conspirators*, and whose estates were declared *forfeited* to the government, were not deprived of dower. *See 9 Mass. R. 363, Sewall vs. Lee.* And the same principle has been recognized, under a similar law of some of the other states. 1 *Johns. Cases*, 27; 2 *Bay's R. 20, Wells vs. Martin.*

If an *alien* is naturalized, the disqualification as [288] to dower is thereby removed; and it seems she will be entitled, not only to be endowed of the lands of which the husband was seised, *after* the naturalization, but of those also which he had aliened *before*. But where a woman is made a *denizen*, she can have dower, only out of those lands of which the husband was seised, *at* or *after* the time of her denizenation. 13 *Co. 23; Cruise*, Tit. VI. ch. 2, § 31, 32. This distinction, however, is unimportant in this country, because our

laws do not recognize that intermediate grade between an alien and a citizen, which is denominated *denizen* by the law of *England*.

SECT. V. By the law of *Massachusetts*, a wife may debar herself of dower in the lands of her husband, by joining with him in a conveyance. And the mode by which this is usually done, is by introducing her in the close of the deed, as expressly relinquishing all claim to dower in the lands conveyed, and by her executing the deed with her husband. 7 *Mass. R.* 20, *Fowler vs. Shearer*; 9 *Ibid.* 172, *Lithgow vs. Kavenagh*; [13 *Mass. R.* 223, *Lufkin vs. Curtis*.] It is not necessary by our law, that the wife should *acknowledge* the deed with the husband, in order to make it binding on her. For the principal object of the acknowledgment is to give evidence to the register of the genuineness of the deed, and that it is entitled to be recorded; for which purpose the acknowledgment of the husband is [289] sufficient, without that of the wife. 9 *Mass. R.* 220, *Catlin vs. Ware*; 7 *Ib.* 30, *Marshall vs. Fisk*. And the student will recollect, that in our practice the acknowledgment and recording of a deed does not dispense with the *proof of the execution of it*, upon the issue of *non est factum*. 9 *Mass. R.* 220.

[By a stat. of *Massachusetts*, (1823, ch. 146, § 2,) the wife of any person under guardianship, as a person *non compos mentis*, or as a lunatic or distracted person, or as a person given to excessive drinking, idleness, gaming or debauchery, may release her dower by joining with the guardian in a conveyance of the land, or by any other deed *duly acknowledged and recorded*.]

When the wife does not join with the husband in the original conveyance, she may debar herself of her dower, by executing a *subsequent* deed with him, in which

the sale of the estate is recited as the consideration, upon which she consents to relinquish her dower. 7 *Mass. R. 20, Fowler vs. Shearer*. But the wife will not be barred of dower, by merely putting her signature and seal to the instrument with her husband, if there are no words in it, expressing, or at least clearly implying an intention on her part, to relinquish her claim to dower in the lands conveyed. 9 *Mass. R. 220, Catlin vs. Ware*; [13 *Mass. R. 223, Lufkin vs. Curtis*; and see 3 *Mason, 347, Powell vs. Monson & Brimfield Manufac. Co.*] [In a recent case it is held, that where the wife joins with her husband in a deed, "in token of her relinquishment of dower," *without any words of grant* on her part, she is *estopped* to claim her dower, although the husband may have conveyed all his right and title to the grantee named in the deed, by a *prior conveyance*. 8 *Pick. R. 532, Stearns vs. Swift*. In *New-Hampshire*, a married woman may bar herself of dower, by a deed executed by her, *without being joined* by her husband. 2 *N. Hamp. R. 507, Shepherd vs. Howard*.]

[But if the wife, having come to an agreement to separate from her husband, make a release to him, *during the coverture*, of all her right to claim dower in his estate, it will be no bar to her recovering her dower, 3 *Greenl. 63, Rowe vs. Hamilton*.]

Where the wife relinquishes her claim to dower, by joining her husband in a deed of conveyance, containing the usual covenants; and the grantee afterwards recovers judgment and satisfaction against the husband, for an alleged breach of his covenants, "that he was lawfully *seised* and had *good right to convey*," [290] such deed cannot be made use of to bar the wife of her dower in the land. For the wife is not

to be deprived of dower, by joining her husband in a deed by which no estate passed from him. 9 *Mass. R.* 143, *Stinson vs. Sumner*. But where the wife joined with her husband in a *mortgage*, and relinquished all her claim of dower, in the estate mortgaged, which was afterwards redeemed by the purchaser of the *equity of redemption*; it was decided that the wife could derive no benefit from the discharge of the mortgage. For since the purchaser of the equity of redemption had all the equitable interest in himself, upon his redeeming the mortgage, the legal estate followed the equitable interest, and he became seised of the whole fee simple, discharged of the wife's dower. 8 *Mass. R.* 491, *Popkin vs. Bumstead*. On the other hand, where the wife joined with the husband in a mortgage, and after the death of the husband, his administrator redeemed, it was held that the wife's right of dower was restored. 13 *Mass. R.* 525, *Hildreth vs. Jones*.

In another case the wife of the mortgagor joined with her husband, and relinquished her right of dower, after which the husband's equity of redemption was taken and sold on execution: but before the purchaser of the equity entered, a person, who had been tenant under the mortgagor, paid the debt to the assignee of the mortgage, who executed a release [291] to the mortgagor. The purchaser of the equity of redemption afterwards entered, and the mortgagor died. It was held that the wife of the mortgagor was entitled to dower, against the assignee of the purchaser of the equity of redemption; because the latter could not set up against the wife the mortgage which she had executed, but *a stranger, and not the purchaser of the equity*, had discharged. 17 *Mass. R.* 564, *Barker vs. Parker*.

[In a late case, where the husband had mortgaged his lands, and, in consideration of his wife's joining in the deed, and releasing her right of dower to the mortgagee, conveyed the equity of redemption to a stranger in fee, for the benefit of the wife, but by a deed which contained *no declaration of a trust*, and, upon the face of it, purported to be for the consideration of a sum of money paid by the grantee; it was held, *as against the creditors of the husband*, that the relinquishment of the right of dower by the wife, was a valid consideration for the conveyance of the equity of redemption; and that it might be proved by parol evidence, that it was the *true* consideration. And if it was an *honest* transaction, and the right of dower was equivalent in value to the equity of redemption, the conveyance was valid; and whether the trust could be enforced by the wife or not, was immaterial. 7 *Pick. R.* 533, *Bullard vs. Briggs.*]

The wife may also debar herself of dower, by accepting a jointure upon her marriage. But no jointure is a bar to dower, unless it be of a freehold estate, *for her life at least*, in lands, tenements, or hereditaments, to take effect in possession or profit, immediately upon the husband's death. 7 *Mass. R.* 153, *Hastings vs. Dickinson*; [4 *Co.* 2, *Mary Vernon's case.*] [But though the estate must be, in point of quantity, for the life of the wife: yet it may be so limited as to be sooner determinable *by her own act*. Therefore an estate to a wife *durante viduitate*, is a good jointure, if accepted by the wife; because it must continue to her *for her life*, unless sooner determined by her own act. 4 *Co.* 3, *Vernon's case.*]

And if a widow be *evicted* of her jointure, which has been regularly settled upon her, she will be *let in to*

claim her dower in the other lands of her husband ; because, by the eviction, the consideration upon which she was to have been barred of her dower, has wholly failed. Therefore when the wife had covenanted with her husband before marriage, that in consideration of a provision made for her by the husband, by an *annuity* to continue *during her life*, she would never demand dower in any lands of which he might die seised [292] and possessed, and the husband afterwards died *insolvent* ; it was held, on *two grounds*, that the wife was not barred of her dower. *First*, Because the provision made by the husband for the wife was not a *freehold estate in lands*, and therefore not a legal *jointure* ; and *Secondly*, Because the consideration, upon which she had consented to relinquish her claim to dower, had wholly failed. 7 *Mass. R.* 153, *Hastings vs. Dickinson* ; see 15 *Mass. R.* 106, *Gibson vs. Gibson*.

[A wife cannot bar her right of dower by any contract or covenant made with her husband, or by any release made to him, *during the coverture*. 3 *Greenl.* 68, *Rowe vs. Hamilton*.]

If the wife *accept* the provision made for her by the husband's *will*, instead of dower, she may thereby debar herself from being endowed afterwards. But our statute has expressly declared, that the widow may *in all cases* waive the provision made for her in the will of her deceased husband, and *claim her dower*, and have the same assigned to her, in the same manner as though her husband had died intestate ; in which case she shall receive no benefit from such provision, unless it *plainly* appears by the will, to be the testator's intention that it shall be *in addition* to her dower. *Mass. Stat.* 1783, ch. 24, § 8 ; [1 *Greenl.* 148, *Perkins vs. Little*.]

It is said that even a *divorce for adultery* was not a bar to dower, by the ancient common law; since such a divorce in *England* was not a *dissolution* of [293] the marriage, as it is in *Massachusetts*. But by the statute of *Westminster 2*, (13 *Edw.* I. ch. 34,) it is declared, that if a wife *willingly* leave her husband, and continue with an adulterer, she shall be barred of her action to demand dower, *if she be convicted* thereupon; *except her husband willingly*, and without coercion of the church, *reconcile her*, and suffer her to dwell with him; in which case she shall be restored to her action.

According to lord *Coke*, though the wife be taken away *against her will*, she shall lose her dower, if she *voluntarily remain* with the adulterer, without being reconciled to her husband. And it will make no difference, though she went away with the *consent* of the husband. *Co. 2 Inst.* 435, 436.

SECT. VI. It often happens that a person about to make a purchase of real property is desirous of taking the conveyance in such a form, as to *prevent a right of dower* in that property becoming vested in his wife. Sometimes, also, a person about to marry is desirous of placing his real property, or a part of it, in such a situation as not to be subject to the dower of the intended wife. It may be useful therefore to the student, to notice the subject in this place, though not strictly a part of the law of real actions.

Of the several methods which have been adopted or proposed, for the purpose of preventing dower, only four will be mentioned.

[294] 1. The purchaser, in some instances, has taken a conveyance to *himself and a trustee jointly*, and to their heirs; but as to the estate of the

trustee and his heirs, *in trust* for the purchaser and his heirs. And this will effect the object of the purchaser, if the trustee should be the survivor; because the wife cannot have dower, (as has been before remarked,) (*Ante*, p. 253,) in lands of which the husband is *seised jointly* with another, who survives him. But if the trustee should happen to die *first*, the whole estate would thereby vest in the husband, as survivor, and consequently the right of dower would *instantly* attach upon the estate. [*See Watk. Conv.* 24.]

2. The estate is sometimes limited either to the purchaser, and a trustee, and the heirs of the trustee, but *in trust* for the purchaser: or the whole estate is limited *immediately* to the trustee and his heirs, *in trust* for the purchaser and his heirs. But both these modes are objectionable, on account of their keeping the *legal fee* out of the purchaser; and in case of the trustee's death they expose the purchaser to *peril*, on the one hand or the other. For if the trustee should die without heirs, the estate would *escheat*; and if he left heirs, they might be *infants*, or *married women*, or persons *residing at a distance*, and perhaps *unwilling to join* in a conveyance. And these difficulties, it may be re- [295] marked, are much more likely to happen here, than by the law of *England*, because the heirs, by our law of descents, are generally much more numerous. These considerations are sufficient to satisfy any one, that it is unwise to suffer the *legal fee* to be outstanding in a trustee.

3. Another method is sometimes adopted, which was first proposed by Mr. *Fearne*. [*Cont. Rem.* 509, *in notis.*] His plan was to have the lands limited in the *fullest manner*, to such person or persons as the purchaser should appoint, and in default of any such ap-

pointment, to the use of the purchaser and his assigns *during his life*; and from and after the determination of that estate, by any means whatever, in *his lifetime*, to the *use of some other person* and his heirs, during the life of the purchaser, *in trust* for him and his assigns; and from and after the determination of the estate so limited *in use*, to the said trustee and his heirs, to the *use of the purchaser*, his heirs and assigns forever.

This method seems to be sufficiently guarded; and it is not liable to the objection before suggested, of the legal fee being placed beyond the control of the purchaser. But the limitations are so involved in each other, as to be, perhaps, quite incomprehensible to any person but a lawyer. [See *Oliver's Conv.* 299, 2d. ed.]

4. Mr. *Butler* has proposed to effect this ob-
[296] ject by a much more simple, and an equally safe and effectual method. It is by *first* limiting the estates to such uses as the purchaser shall by *deed or will* appoint, and for want of appointment, to the *use of a trustee*, his heirs and assigns, *during the life* of the purchaser, *in trust for him*, and subject thereto, to the use of the purchaser, his heirs and assigns. This seems to be much preferable to either of the other modes; since it is far more *safe and effectual* than the two first, and also more *simple* and obvious than the other. By adopting this method, the dower of the wife will unquestionably be prevented; the purchaser will always have *complete command* of the *legal fee*, during his life; and at his death, it will descend to his heirs. See *Co. Litt.* 379, b, n. 1; *Ib.* 216, a, n. 1.

SECT. VII. When the husband dies *seised*, the widow's dower may be, and usually is, assigned by commissioners appointed by the Probate court. But this was never a part of the jurisdiction of the ecclesiastical

courts, as incident to the administration of the estates of deceased persons.

Under the *colonial* government, the county courts were invested with the jurisdiction exercised by both the *temporal* and *spiritual* courts in the parent country. As courts of *law*, they had jurisdiction in cases of dower, according to the principles of the common law; and as our ancestors would on no account tolerate a tribunal, which resembled the *ecclesiastical courts* in *England*, they were obliged to commit to the *county courts*, the jurisdiction of testamentary causes. And when courts of probate were established, the business of assigning dower seems, (without any explicit legislative authority,) to have been assumed by them, as an *appendage* of their general powers, in relation to the settlement of estates. 9 *Mass. R.* 12, *Sheafe vs. O'Neil*.

The proceedings in the probate court are instituted by a *petition*, presented by the widow, her attorney or agent, setting forth concisely the facts upon which her claim is founded, so as to show that her case is within the jurisdiction of the court. These proceedings, however, are generally amicable, and the commissioners are often named by *consent* of the widow and heirs. But when that is not the case, notice to the heirs should precede the appointment of the commissioners.

The warrant to the commissioners directs them to give notice to all persons interested, of the *time of setting off the dower*. They should also have notice of the time when the proceedings of the commissioners are *returned* to the court. Generally, the *assent of the widow and the heirs*, to the acceptance of the report or return, is expressed in writing. When they do not [298]

consent, an opportunity must be given them, to make their objections.

Where the estate in which dower is claimed is under mortgage, this court cannot proceed to the assignment of dower, *without the assent* of the mortgagee or assignee of the mortgage. 9 *Mass. R.* 13, *Sheafe vs. O'Neil*. The jurisdiction of the probate court is not limited to *lands in the same county*; neither is it required that the commissioners should all be either *freeholders* or *inhabitants of the county* where the deceased husband dwelt. 12 *Mass. R.* 454, *Miller vs. Miller*. The commissioners, in assigning dower, are to have regard to the *rents and profits* or annual income of the estate, and not to the absolute value of the inheritance. 4 *Mass. R.* 533, *Leonard vs. Leonard*.

When the land in which dower is claimed is held *in common*, the Probate court may direct the commissioners *first to sever* the tenancy in common, and then proceed to assign the dower: or if the nature of the case permit, and the *parties request it*, dower may be assigned, without first severing the tenancy in common. *Mass. Stat.* 1820, ch. 54, § 1.

The authority of the Probate court to assign dower *does not exclude* the jurisdiction of the courts of [299] common law; but is only *concurrent* with it.

And it is a general rule of law, that where different courts have concurrent jurisdiction, the court in which proceedings, are *first instituted*, and whose jurisdiction consequently *first attaches*, must necessarily have authority paramount to the other, in relation to the subject matter of that suit. 16 *Mass. R.* 171, *Stearns vs. Stearns*.

In all cases, where a claim of dower is made upon lands which were aliened by the husband, or taken in

execution for his debts, the claim can be enforced in *Massachusetts*, only by a writ of Dower in the courts of law. 9 *Mass. R.* 9, *Sheafe vs. O'Neil*. And if the husband or his grantee has aliened distinct parcels to different persons *in severalty*, there must of course be *several actions*, and dower must be assigned out of each. 1 *Greenl. R.* 30, *Fosdick vs. Gooding*.

In *England*, and also in several of the states, where courts of equity with general chancery powers are established, those courts and the courts of law have concurrent jurisdiction in relation to the assignment of dower. But the *Equity jurisdiction* of our courts is very limited, and does not extend to this subject.

SECT. VIII. It has been already remarked, that the proceedings in writs of Dower in our courts are in a great measure regulated by statute. And [300] these statutory provisions, aided by the judicial decisions which they have called forth, have established a course of practice in this action, somewhat different, though nearly resembling the practice of the *English* courts, in the writ of *Dower unde nihil habet*.

This ancient writ, of which it seems proper to take some notice in this place, is said to be a *writ of Right in its nature*. It was the appropriate remedy for the widow, where she had received *no part* of her dower from the tenant against whom the action was brought; though she might have had *some part of it*, assigned to her by *another person*. But if she had accepted a part of her dower, of the *same tenant*, and in the *same town*, the allegation of *unde nihil habet* in the writ would be untrue; and her only remedy was by a *writ of right of Dower*. *F. N. B.* 147; *Booth*, 166; *Finch*, 89, b. A writ of Dower was to be brought against *the tenant of the freehold*; or where there was a guardian *in chivalry*,

it might be sued against him, though he was *not tenant* of the freehold. But it could *not* be maintained against a guardian *in socage*. *Finch*, 90, a.

By the ancient law, *voucher* and the *common essoin* lie in this action; but there could be only one [301] *essoins* after issue joined. *View* might be demanded by *a stranger*. [*Booth*, 38.] But if the action was against *the heir*, whose ancestor had died seised, he was not entitled to a view. *Booth*, 167. And by the statute of *Westminster* 2, (13 *Edw.* I. ch. 48,) even the *alienee* of the husband is not allowed a view. *Co. 2 Inst.* 481. In favour of the claim of dower also, it was early determined that the parol should not demur for the nonage of the tenant. 12 *Edw.* IV. 12.

By our statute of 1783, ch. 40, § 1, it is provided "that if the *heir*, or other person having the next immediate estate of *freehold* or *inheritance*, shall not within *one month* next after demand made, assign to the widow her dower, whereof she may be dowable, she may recover the same by *writ of Dower*, to be brought against the tenant *in possession*, or the persons who claim *right* or *inheritance* in the same estate." It is necessary, therefore, by that statute, that the *demand* should be made of the person who took the next immediate estate of freehold, whether as *heir*, *grantee*, *abator*, or *disseisor* of the husband: though he may be a *different* person from the tenant of the freehold, against whom the action must be brought. 12 *Mass. R.* 485, *Parker vs. Murphy*.

[It is now further provided by stat. 1828, ch. 137, § 5, "that no action or writ of dower shall be maintained, unless a *demand* shall have been made for the assignment of the same, *upon the person who is tenant of the*

freehold at the time of making thereof, at least one month previous to the commencement of such action." As the requirement by the former statute, of a demand upon the heir or person having the next immediate estate of freehold or inheritance is not dispensed with by the new statute; it seems a demand on both, where they happen to be different persons, will be necessary hereafter.]

The action cannot be maintained, unless a demand has been made *one month* at least before it was commenced. But it seems that both of the ex- [302] ceptions, viz. that the demand was not made upon the *heir* or *other person*, having the next immediate estate of freehold or inheritance; and that the action was commenced within *less than a month* after the demand, must be made by a plea in abatement. For if the tenant plead *ne unques accouple in loyal matrimoine*, (which is, perhaps, the only plea that can be considered a *general issue*, in a writ of dower;) See 2 *Wils.* 128, *Robins vs. Crutchley*; [*Steph. on Plead.* 173;] or if he deny the *seisin*, or the *death* of the husband, it must be considered an *admission* of the sufficiency of the demand. 10 *Mass. R.* 83, *Ayer vs. Spring*.

[Dower, it seems, may be demanded and also assigned by *parol*; and an *authority to make a demand* of dower for another person, may be given in the same manner. It is not necessary that the demand should be made on the land. And he who is authorized to demand dower for another, has, *by implication*, an authority to assent to it, and to receive an assignment of it. 4 *Greenl. R.* 67, *Baker vs. Baker*.]

The form of our writ of Dower, as of most other writs, is established by statute; (*Mass. Stat.* 1783, ch.

40, § 3,) and the *count* in our practice is very nearly the same, as in the writ of Dower *unde nihil habet*, at the common law. *App. No. 75*. In this action it is not necessary to describe the lands by *metes and bounds*, if they are sufficiently distinguished and known by any particular name or other description. It may be remarked, indeed, that a precise description of the premises is the less requisite, because the third part is to be assigned to the demandant, upon a *view* of the whole. 10 *Mass. R.* 83, *Ayer vs. Spring*.

Writs of Dower are issued, endorsed, and [303] served, in the same manner as writs of Entry, and other real actions. *Ante*, p. 90, 174. And the statute, (1797, ch. 50, § 4,) which requires that "when the tenant against whom a *real action* is brought, is not in *actual possession* of the lands demanded, the person *in possession* shall be served with a copy of the writ or original summons, or by having it read to him," *expressly* includes writs of Dower, as well as other real actions. The same remark applies also to the other statute, which provides that if the tenant is arrested, "his own bond, and no other shall be required for his appearance to answer to the same." *Stat.* 1795, ch. 75, § 1.

SECT. IX. To writs of Dower, as to all other real actions, the tenant may plead *in abatement* or *in bar*. And it may be here remarked, that the *pleas to the writ* are very nearly the same in this action, as in writs of Entry; but the *pleas in bar of the action* are almost *wholly different*. Still, however, as the same *general principles* apply to the pleadings in both actions; it may, perhaps, be sufficient for our present purpose, to refer to what has been before stated, (*Chap. IV.* § 17, 18, 19.) and only to add in this place *a few remarks* upon those *pleas which are peculiar to writs of Dower*.

And it may be observed in the first place, that the omission of the demandant to comply with [304] the requisitions of the statutes referred to in the last section, (*Ante*, p. 272,) may give occasion to plead several pleas in *abatement*. 1. The demandant may commence her action, without *making any previous demand* to have her dower assigned. 2. After a proper demand has been made, the action may be commenced *before the month*, required by the statute, *has elapsed*. 3. The demand, though seasonable, may not have been made upon the *proper person*, or upon all the persons required. And each of these exceptions might be made the subject of a distinct plea in abatement. But the two first exceptions, it seems may be well enough comprehended in a plea of the same form, without making it objectionable on the ground of *duplicity*; and therefore one precedent will be sufficient for both purposes. *App. No. 76.*

As to the third exception, it will be recollected that the demand of dower is required by the statute of 1783, ch. 40, § 1, to be made upon "the heir, or person having the next *immediate estate of freehold or inheritance*." That person, when not the heir, may be either the *alienee* or *disseisor* of the husband, or an *abator*, who after the death of the husband, has entered *before the heir*. And the plea, it seems, should expressly aver, that the person therein named had the next *immediate estate*, at the husband's death. But it does not appear to be necessary to allege *in what char* [305] *acter* he took the estate; whether as disseisor, abator, or alienee of the husband. But if the estate descended to several heirs, it seems the plea ought to deny that any demand had been made upon either of them. *App. No. 77.*

[With respect to the late statute of 1828, ch. 137, § 5, as it expressly declares "that *no action or writ of dower shall be maintained* unless a demand shall have been made for the assignment of the same, upon the person who is *tenant of the freehold*," &c.; it seems the exception for want of such a demand might be made by a plea in *bar*, as well as by a plea in *abatement*.]

If the husband aliened distinct parcels to different persons *in severalty*, there must be several *distinct demands*, as well as *separate actions*. But if *several tenants* of distinct parcels who ought to have been sued separately *are sued jointly*, the exception must be taken by pleading *several tenure in abatement*. 1 *Greenl. R.* 30, *Fosdick vs. Gooding*.

PLEAS IN BAR are not very numerous in this action; and according to the ancient practice, they were, (as has been already intimated,) nearly all of them different from the pleas applicable to writs of Entry. But *non-tenure* and *disclaimer*, which in *England* could be pleaded only in *abatement*, are by our practice allowed to be pleaded in *bar*, as we have already seen. *Ante*, p. 193, 194, [and 1 *Greenl. R.* 30.] And as writs of Dower, like writs of Entry, can be maintained only against the tenant of the freehold, it follows of course, that these pleas, which deny that the freehold is in the tenant, are equally applicable to both actions. 14 *Mass. R.* 239, *Otis vs. Warren*.

Besides the *general pleas* already mentioned, [306] there are *several other pleas in bar*, peculiar to writs of Dower, which will now be briefly noticed; and of which the tenant may plead more than one, by leave of court, if his case require it. 9 *Mass. R.* 218, *Catlin vs. Ware*. 1. The first we shall mention is the plea, that "the demandant was never lawfully married;"

generally denominated a plea of *ne unques accouple in loyal matrimonie*. And this plea is sometimes considered the general issue in this action. 2 *Wils.* 128, *Robins vs. Crutchley*. But in our practice this plea is concluded *with an averment*, and not as pleas of the *general issue* usually conclude. *App. No.* 78. And the demandant, in her replication, affirms a marriage at a particular time and place, and concludes to the country. *App. No.* 79.

As questions relating to the legality of marriages are not generally cognizable by the courts of common law in *England*, both the plea and replication in this case conclude in the same manner, with the averment, "*et hoc paratus est verificare, ubi et quando, et prout curia,*" &c. *Rast.* 228, a. pl. 3. Then follows the mandate to the bishop, "diligently to enquire, and to certify to the court the truth in the premises;" and his certificate is conclusive upon the question. But where to a plea of *ne unques accouple*, the demandant replied alleging a lawful marriage in *Scotland*, it was held that [307] the fact *might be tried by the jury*; and therefore it was proper to conclude the replication to the country. *H. Bl.* 145, *Ilderton vs. Ilderton*.

2. The tenant may plead that the husband of the demandant was not seised of such an estate, as to entitle her to dower; which is usually styled the plea of *ne unques seisie que dower*, and by some considered the general issue in this action. *Steph. on Plead.* 173, note (P.)

As the count expressly avers a seisin in the husband, this plea, which denies that averment, does not usually conclude with a verification, but to the country. *App. No.* 80; *Rast.* 230, a. pl. 10.

3. The tenant may also plead in bar that the husband of the demandant is living in some other place, which he names in his plea. *Booth*, 169. And this plea

should conclude with an averment, so as to give the demandant an opportunity of making an explicit denial of that allegation. *App. No. 81; Rast. 228, a. pl. 1.* It may perhaps be thought, that after the statement of the husband's death in the count, the plea, which avers that he is living, ought to conclude to the country, like the plea in the preceding case, which denies the husband's seisin during the coverture. But it may be remarked that the statement of the husband's death is rather by way of *recital*, and not a *formal averment*, like the allegation of seisin in the case referred to.

[308] To this plea the demandant may reply, expressly affirming the death of the husband, and concluding to the country. *App. No. 82.* The ancient precedents of this replication state not only the *time and place* of the husband's *death*, but also mention *in what church-yard* he was interred. *Rast. 228, a. pl. 1.* But this last averment is quite unnecessary.

It is mentioned in several books, as a striking *peculiarity* in the *action of dower*, that when the tenant pleads this plea, the issue is to be tried *by witnesses*. *Finch, 89, b; Booth, 167; Co. 2 Inst. 80; [9 Co. 30, b; Steph 123.]* And *Rastell* gives the form of the *entry* of this trial upon the record, with the *testimony of the secta* or witnesses, produced on the part of the demandant. *Rast. 228, a. pl. 1.* It is admitted on all hands, that this mode of trial, (which seems to be as ancient as the law,) was permitted in this instance, as a special favour to the demandant, that the tenant might not delay the decision, as he would be able to do, if this issue were to be tried by a jury. In *our practice*, this issue is of course to be tried by a jury, like all other issues of fact.

4. Another defence, which may be pleaded in bar of this action is, that the tenant, (or some other person

who was tenant at the time,) *has already assigned* to the demandant her reasonable dower, out of the lands in question. This plea should expressly [309] aver the *acceptance* by the demandant, of the dower so assigned. *App. No. 83; Rast. 229, b. pl. 6.* And the demandant may, by her replication, deny that any assignment was made, *prout*, &c.; concluding to the country. *App. No. 84; Rast. ubi sup.*

[It is not necessary to set forth an assignment by deed, or even in writing; an assignment in *pais* being sufficient, notwithstanding the requirement of the statute of frauds. For the assignment is not a conveyance of real estate; since the wife does not hold *of the heir*, but *of her deceased husband, et ex provisione legis*. 1 *Pick. R. 191, Conant vs. Little*; 2 *N. Hamp. R. 48, Johnson vs. Morse*; 4 *Greenl. 67, Baker vs. Baker*; 3 *N. Hamp. R. 163, Pinkham vs. Gear.*]

[Dower may be assigned by a guardian, notwithstanding the *general rule*, that the guardian cannot by his contract bind the person or estate of his ward. And where lands were assigned by the guardian as dower, which proved to be subject to a mortgage; it was held to be an assignment *against common right*, and that, as between the widow, and an innocent purchaser of the other lands of the husband, she was bound by it. 1 *Pick. R. 314, Jones et ux. vs. Barrett.*]

5. It has been before mentioned that the wife might bar herself of dower, by executing a deed of conveyance with her husband, and thereby expressly relinquishing her claim to dower in the premises. But such a relinquishment by the wife must be pleaded in bar by the tenant; and cannot be given in evidence under any other issue. *App. No. 85.* The demandant may reply, that she did not relinquish her right of dower, &c.

negating the terms of the plea. But if the plea sets forth a release of dower, with a profert of the deed, it seems the demandant, if she denies the execution of it, may, upon *oyer*, reply *non est factum*, generally; or if she admits the execution of the instrument, and only denies the sufficiency of it *to bar her action*, she may crave *oyer* of it, and demur.

6. If the husband was *joint-tenant* with another who survived him, of the lands in which dower is demanded, the wife, as we have before seen, (*Ante*, p. 253,) cannot be endowed. But this defence, (though it goes [310] to the *seisin* by the husband,) must be pleaded in bar, and cannot be given in evidence under the plea of *ne unques seisie que dower*.

7. Another plea in bar, not very unfrequent in ancient times, was the plea that the demandant had voluntarily eloped from her husband, and lived in adultery, without having ever been *reconciled* to him during his life. To this plea the demandant might reply in such a manner, as to take issue upon the *elopement*, or the subsequent reconciliation to the husband. *Rast.* 230, a. pl. 30; 2 *Co. Inst.* 433, 435. But it is said by lord *Coke*, that cohabitation is not conclusive evidence of reconciliation; (*Co. 2 Inst.* 436,) though the contrary doctrine seems to be held in *Dyer*. *Dyer*, 106, b. pl. 22, *Howorth vs. Herbert*. [The wife does not forfeit her dower by committing adultery, unless she also elopes with the adulterer. 3 *N. Hamp. R.* 41, *Cogswell et ux. vs. Tibbets*.]

It was formerly a very common plea to a writ of Dower, (especially when the action was brought against the *heir of the husband*,) that the demandant detained from the tenant, the *charters*, or evidences of title to

the lands descended. This was called a plea of *detinuit of charters*, and was held to be a good plea in bar.

But the demandant might avoid it, by replying that she was *always ready* to deliver them; and she might tender them in court, and have judgment *forthwith*. *Rast.* 229, b. 230, a. But our law re- [311] specting the registering of titles, and the practice under it, seem to have rendered this plea obsolete; and it does not appear to have been adopted in our courts.

Besides the pleas which have been already noticed, there are several others to be found in *Rastell* and the other books of *entries*; but as they seldom occur in practice, and few of them are applicable to our circumstances, they need not be mentioned.

With regard to the VERDICT in this action, no particular remarks seem to be required. As in all other cases, it should be made conformable to the pleading, and distinctly find all the points in issue between the parties. But, as was before remarked in relation to writs of Entry, (*Ante* p. 217,) if the *substance* is found for the demandant, she will be entitled to judgment, though all the circumstances are not particularly found.

SECT. X. The JUDGMENT for the demandant in an action or writ of Dower, where she has obtained a verdict, is, "that the said M. recover her seisin against the said A. of the said third part of the tenements aforesaid, with the appurtenances, and her damages assessed by the jury, in form aforesaid, at the sum of dollars, together with her costs," &c.

If the judgment is upon confession or default, the damages may be assessed by the court, with *the assent* of the demandant, or, upon his motion, [312] by a jury, at the bar of the court. *Stat.* 1784, ch. 28, § 7; 6 *Mass. R.* 499, *Perry vs. Goodwin*.

And when the damages are assessed by the court, the form of the judgment is so far varied, as to make it conformable to that fact.

By the *common law*, no damages were given in the action of dower, or any other real action. The statute of *Merton*, (20 H. III. ch. 1,) gave the wife damages against the heir of the husband, for land of which he had died seised. And by the law of *England*, no damages are recoverable against any other person than the heir, or an abator, or their assignees. *Co. Litt.* 32, b. The law upon this subject appears to be the same in *New York*. 2 *Johns. R.* 119, *Embree vs. Ellis*. But if the heir has aliened, there seems to be no apportionment of the damages between him and his grantee; but the tenant in possession is answerable for *all the damages*, from the death of the husband. 6 *Johns.* 390, *Hitchcock vs. Harrington*.

If the tenant, (according to the practice of the *English* courts,) comes the *first day*, and acknowledges the action, and pleads that he was *at all times ready* to render dower, the demandant may take judgment [313] immediately for *her seisin only*, without damages.

But if the demandant would claim her *damages* for the detention of her dower, she must reply, that she *requested* the tenant to assign her dower, which he had not done; and if the tenant take issue upon the demand, and it is found for the demandant, she will of course be entitled to judgment for her *seisin and damages*. See *Co. Litt.* 33, a. n.

But in *Massachusetts* the law is otherwise. The object of the statute (1783, ch. 40, § 1,) before referred to, is to give the wife damages *in all cases* where she is entitled to dower, if it is not assigned to her in a *reasonable time after it is demanded*, whether the husband

died seised of the land, or not. And that time is fixed at *one month*. But the demand is not only necessary in order to entitle the wife to damages for withholding her right, as in *England*; it is an *indispensable prerequisite* to the maintenance of the action, even for the recovery of the dower.

[By statute of 1816, ch. 84, it is declared, "that in all cases where any person *has died*, or *shall die* seised of any estate, leaving a widow, who is lawfully entitled to dower therein, such widow shall be and hereby is entitled to have and receive one undivided nett third part of the rents, incomes and profits of such estate, until the heir or heirs of such deceased person shall assign and set out to such widow her dower, according to law, or until the same shall be actually assigned and set out to her, under a judgment of court, or an order of a court of Probate." This statute has been construed to apply only to those cases where the *heirs of the deceased husband* refuse or neglect to have the dower reasonably assigned; the *heirs only* being mentioned, as the persons who are to assign and set out the dower. 3 *Pick. R.* 475, *Gibson vs. Crehore*. It seems, therefore, not to be applicable to the assessment of damages in this action, any farther than it may be regarded as a legislative recognition of the principle, upon which the computation is to be made.]

With regard to the *value* of the dower, to be recovered by the demandant, there is an important distinction to be noticed, between those cases where the husband *died seised*, and where he had *aliened* the land in his lifetime. If the husband *died seised*, the dower is to be assigned according to the value of the property *at the time of the assignment*, however long [314] the wife may have delayed to make the demand.

But where the husband aliened the lands in his lifetime, and the increased value has arisen from the labour and expense of the purchaser, it is said that the wife "is entitled to her third part of the land, in the condition it was in at the time of the alienation of her husband." 9 *Mass. R.* 221, *Catlin vs. Ware*. In another case, where dower was demanded in land that had been set off upon execution to a creditor of the husband in his lifetime, the court say, "the demandant might have been restrained to the value of the land, as it was at the time of the extent of the execution against the husband." 10 *Mass. R.* 83, *Ayer vs. Spring*. Still it does not appear to be determined, whether the wife shall be excluded from the benefit of the *increase* of the rents, or *appreciation* of the value of the estate, arising from causes *unconnected with any improvements* made by the labour or expense bestowed by the purchaser; or whether she is to be excluded from the benefit of the improvements, arising from such *labour and expense only*, and not from the increased value arising from accidental causes.* The latter position seems to be clearly intimated by the remarks which fell from the court in one case. But those remarks are to [315] be regarded as the *dictum* of the chief justice, and not the opinion of the court, as the point in question did not arise in that cause. 3 *Mass. R.* 544, *Gore vs. Brazier*.

* Since the first edition of this work was published, it has been determined by the Circuit Court of the U. S., that dower is to be according to an increase of value, not arising from the improvements of the purchaser, but from the general growth of the country, or other general causes. 3 *Mason*, 347, *Powell vs. Monson and Brimfield Manufac. Co.* And a mortgage is not an alienation, so as to prevent dower from attaching to the improvements. *id.*

In *New York* it is provided by statute, that where the husband aliened the land, the wife shall recover dower "according to the value, exclusive of the improvements made since the sale." And the court has given such a construction to it, as excludes the wife, not only from the benefit of the *improvements made by the purchaser*, but from the *increased value* arising from any other cause. 2 *Johns. R.* 484, *Humphrey vs. Phinney*; 11 *Johns.* 510, *Dorchester vs. Coventry*; 15 *Johns.* 23, *Dolf vs. Basset*.

This construction, it should be observed, was made, partly at least, with reference to the doctrine established in that court, with regard to the damages to be recovered in actions of covenant: it being there held that the grantee who has been evicted cannot recover damages, either for the improvements he has made, or the increased value of the land. 4 *Johns. R. Pitcher vs. Livingston*.

A like distinction was early adopted in the *English* courts, between a recovery against the *heir*, and against *his assignee*. For if the recovery was against the heir, the dower was assigned according to the value at the time of *the assignment*, although the value might have been enhanced by the improvements made by the heir. But if the value had been increased [316] by buildings, or other improvements, made by the grantee of the heir, and dower was afterwards recovered against him, it was to be assigned according to the value *at the time of the conveyance*. The reason assigned for the distinction is the same that is referred to by the court of *New York*, that the heir would only be bound to warranty, according to the value at the time he made the conveyance. Therefore, if the wife were allowed to recover, according to the improved value, it

would be more than the tenant would recover over against his feoffor or grantor. *Co. Litt.* 32, a. n. 8.

This reason, it may be remarked, does not hold in the law of *Massachusetts*. For the grantee of the heir, against whom dower has been recovered, has, by our law, a remedy against his grantor, upon the covenant *against incumbrances*, or the covenant of *warranty*, usually contained in our conveyances : and upon breach of either of those covenants, the rule or measure of damages would be the *actual injury* sustained by the eviction. 3 *Mass. R.* 546, *Gore vs. Bravier*.

It seems, however, that where the action is brought to recover dower, in lands which were aliened [317] by the husband, the tenant, (if he would avail himself of the circumstance that they had been increased in value by improvements made since the alienation,) should put that fact *upon the record* by a proper plea or suggestion ; and not controvert the right of the demandant to recover. 10 *Mass. R.* 83, *Ayer vs. Spring* ; *App.* 86.

[Where the tenant, who was a purchaser, pleaded that he could not deny the right of the demandant to be endowed, but that he had made improvements on the land, and that he had always been ready to render to the demandant her reasonable dower, according to her just rights *in respect to the increased value of the land*, and that on such a day he assigned a third part of the land, in the condition in which it was at the time of the alienation, by metes and bounds ; and prayed that the increased value might be inquired of : upon *demurrer*, it was held, that the tenant's plea, as a plea in bar, was bad : and that it must be construed as an admission of the demandant's right to recover dower, according to the value of the estate at the time of the alienation, and

a denial of her right to be endowed of the improvements. 8 *Pick. R.* 532, *Stearns vs. Swift.*]

The statute before referred to does not contain any provision for ascertaining whether the lands aliened by the husband, and in which dower is demanded, have been made more valuable, by the improvements of the tenant, after the alienation. And probably no settled practice exists in our courts upon the subject. Perhaps the most correct as well as the most convenient method would be, (after the proper allegation and request has been put upon the record by the tenant,) to have the increased value found by the jury, at the bar of the court, in the manner of the inquiry as to the value of the *improvements* made by the tenant, and those under whom he claims, in writs of Entry. Or with the assent of the parties, it might perhaps be more conveniently determined by an *assessor*, named by them or by the court. See 15 *Johns. R.* 23, *Dolf vs. Basset*. [In the case of *Walker vs. Dewing & al.* (*S. J. Court, Middlesex, Oct. Term, 1829,*) the increased value of the land demanded in dower, was found by the jury, under the direction of the judge, in the manner above suggested.]

SECT. XI. By the ancient law, after the demandant had recovered her dower, she might sue out her writ of *Habere facias seisinam*, with a *Fieri* [318] *facias* clause as to the damages and costs. 2. She might take an *Elegit* for the damages, with which the *Habere facias seisinam* might be united, in the same precept. Or 3. She was allowed to take her *Habere facias seisinam*, and a separate writ of *Elegit*. Sometimes the writ expressly commanded the sheriff to cause the demandant to *have seisin and assignment* of one third part of the lands *by metes and bounds*. In other cases he was only commanded to cause her to have

seisin of the third part of the land, and to make known to the justices, at the return of the writ, in what manner he had executed it. *Rast.* 235, a, b. But it was the duty of the sheriff to make the assignment *by metes and bounds*, in the latter case, as well as in the former.

If the sheriff does not return that he has given seisin *by metes and bounds*, it will be ill, unless it appears that no division of the inheritance could be made; as where dower is recovered in a mill, or in common of pasture, and the like. *Co. Litt.* 32, a, b. But the demandant may waive the right to have the assignment *by metes and bounds*; and in that case an assignment *in common*, or of the whole for a certain portion of time, will be good.

After the recovery of judgment in a writ of Dower, the demandant cannot enter immediately, without [319] suing out a writ of seisin, as she might do after a recovery in a writ of Entry. For the recovery is not of any *certain part*; but it is to be made certain by the *metes and bounds* to be established by the sheriff. *Co. Litt.* 34, b; 16 *Mass. R.* 193, *Hildreth vs. Thompson*. [And therefore the right of a widow, to be endowed of a third part of her husband's lands, is not an interest in land, which can be attached, or taken in execution for her debt, until her dower is actually assigned.]

If under the *Habere facias seisinam* in dower, the sheriff gives seisin of more than a third part, the remedy of the tenant is by a *scire facias*, to have an admeasurement of the lands set forth in the return. *Vin. Dower*, Q. a. pl. 16. But where the guardian, or the heir himself, while *under age*, has endowed the wife of more than a third part, his remedy is by a *writ of Admeasurement of Dower*. *Ib.* pl. 7, 8.

By the law of *Massachusetts*, upon the recovery of judgment in a writ of Dower, a writ of seisin, (the form of which is prescribed,) issues to the sheriff, who is required by the statute to cause the dower to be set forth, by *three disinterested freeholders of the county*, who are to be sworn before a justice of the peace, "to set forth the same equally and impartially, without favour or affection, as conveniently as may be." *Stat.* 1783, ch. 40, § 2; *App.* 87. And it is to be by *metes and bounds*, unless the estate is incapable of division; and in that case, (as by the common law,) it may be by "a third part of the *rents, issues, or profits*."

If after the judgment is recovered, the tenant [320] die before the writ of seisin is sued out and served; though it be afterwards sued out and served, nothing will pass by it. 16 *Mass. R.* 191, *Hildreth vs. Thompson*. And if after verdict for damages, but *before judgment*, the demandant die, it seems that no *scire facias* lies for the executor or administrator of the demandant, to have execution for the damages and costs. For the damages are only due by way of satisfaction for an injury, in withholding her dower, which is in the nature of a *tort*, which dies with the party who *suffers*, as well as with him who *does it*. But if judgment had been rendered in the lifetime of the demandant, (though the writ of seisin had not issued,) the damages would have *vested* in her *as a debt*; and in that case the executor or administrator should have had them. 1 *Salk.* 252, *Mordant vs. Thorold*; [*Yelv.* 112; 3 *Mod.* 281.]

The stat. 1783, ch. 40, § 3, before mentioned, (in affirmation of the common law,) expressly prohibits the party who recovers dower from *committing* or *suffering* any *strip or waste*, upon penalty of forfeiting the part of the estate upon which such strip or waste shall be made,

and damages also, to be assessed to the person who has the next *immediate estate* in remainder or reversion.

[321] It only remains to add, that the assignment of dower implies a warranty of title by the party who makes the assignment. Therefore if the tenant in dower was impleaded, she might *vouch*; by the old law, and upon an eviction, recover *a third* of the two remaining parts of the land, whereof she was endowed. *Co. Litt.* 38, b. And it seems also, that if she is evicted of the third part set off to her upon a writ of seisin by the sheriff, she may thereupon have a *scire facias*, and recover for her dower one third of the remaining lands of which her husband was seised, and of which the tenant, against whom she recovered her dower, continues to be seised.

CHAPTER VI.

Writs of Formedon, and the proceedings therein.

SECT. I. THE WRIT OF FORMEDON is an ancient remedy provided by the law for him who hath right to lands or tenements, by virtue of a gift *in tail*; and it lies for the *heir in tail*, the *reversioner*, or the *remainder-man in tail*, or *in fee*. It is called a Formedon, *Brevé de forma donationis*, because the demandant claims the estate according to the form [322] of the gift, *secundum formam doni*. [It seems to lie in those cases only, where the title *depends on a gift*; and the right is to be asserted by reason of the gift, and in conformity to it. For when the donee in tail, or the issue, or the person entitled to the reversion or remainder, has obtained *actual* seisin, or perhaps even a seisin *in law*, and is afterwards actually disseised, it seems he may maintain a writ of Entry *sur disseisin*, grounded on such actual seisin, or perhaps a writ of Intrusion, founded on such seisin in law. And this distinction may sometimes be important; since the *writ of Entry* might be brought after the *Formedon* was barred by the statute of limitations. But if the party who had gained the actual seisin, in the manner above mentioned, should afterwards be disseised, and die without regaining his seisin, it seems that his *issue*, claiming *per formam doni*, and also the person entitled to the reversion

or remainder, would now be obliged to resort to their *Formedon*. See 2 *Prest. Abst.* 343, 344.]

The writ of *Formedon* is of three kinds, according to the character or capacity in which the demandant makes his claim. If the demandant claims the inheritance as an *estate tail*, which ought to come to him by descent from some ancestor to whom it was first given, his remedy is by writ of *Formedon in the descender*. But if, instead of claiming as heir to the entail, his claim is to the *reversion* after the estate tail has *expired*, or been otherwise *determined*, the appropriate remedy by which the reversion is to be recovered, (whether the demandant is the original donor of the estate tail, or his heir or assignee,) is by writ of *Formedon in the reverter*. And where the demandant does not claim an estate tail by *descent*, or the *reversion* after such an estate is determined, but his claim is to the *remainder* of the estate, either in *tail*, or in *fee*, after the determination of some prior estate in *tail* or *for life*, the proper action for his purpose is the writ of *Formedon in the remainder*.

This writ is said to be in the *nature* of a writ of Right, or sometimes, to be the writ of Right for the tenant in *tail*; for he can have no higher writ, since the *absolute writ of Right* is confined to those who claim [323] an estate in *fee simple*. *Co. Litt.* 326, b; *Co.*

2 *Inst.* 291. As every writ of *Formedon* is for the recovery either of an estate tail, or the fee simple, it follows of course that it must be brought *against the tenant of the freehold*; consequently if the person against whom it is brought has not the freehold, he may abate the demandant's writ by pleading *non-tenure*, unless he is *pernor* of the profits.

By the statute of 1 *H. VII.* ch. 1, writs of *Formedon* are maintainable against the *pernors of the profits*,

though they may not be tenants of the freehold: and all recoveries against such persons as take the profits were declared to be as good and effectual for the recoverers and their heirs, as if the said persons had been actual *tenants of the freehold*. *F. N. B.* 212, (*Ante*, p. 182,) But the writ shall suppose such persons to be tenants of the freehold, and shall not be different from the usual form. And if the tenant plead non-tenure, the demandant may reply, that the tenant made a feoffment to persons unknown, to defraud him of his action, and aver that he continues to take the profits. To such a replication, according to the ancient practice, the tenant could only rejoin, by denying that he took the profits; for the feoffment was not allowed to be traversed. *Vin. Form. G.* pl. 4, 5; *Bro. Traverse*, pl. 180.

If the heir in tail has once acquired the seisin, [324] after the death of his ancestor, he shall not afterwards have a writ of Formedon, until he has been *lawfully* deprived of his seisin. For if the heir in tail is *ousted*, after he has acquired a *seisin in fact* of the estate tail, his remedy is by a writ of *Entry*, upon his *own seisin*, and not by a writ of *Formedon*. Therefore if a tenant in tail *discontinues* the estate tail, and dies, and his heir enters upon the *discontinuee*, and acquires the seisin of the estate tail, and then is *ousted* by a stranger, in such a case the heir in tail shall not have a writ of Formedon in the descender against the stranger; but a writ of *Entry*. But, if after the stranger has *ousted* the heir, the *discontinuee* re-enters, he is thereby invested with his former estate, and the remedy of the heir against *him* is by a writ of Formedon in the descender. *Bro. Form.* 47; 7 *Edw. IV.* 19; *Vin. Form. E.* pl. 4, 5.

Writs of Formedon may be maintained, not only for lands, but for such real hereditaments as may be entailed. And these, according to the ancient law, include also *rents*, *commons*, and what are denominated *profits appendre*, issuing out of lands and tenements; as a grant of a certain sum of money, issuing out of any lands, to a man and the heirs of his body; [325] and also a like grant of the moiety of the profits arising from a mill, a ferry, a fishery, and the like. *F. N. B.* 212. But in our practice, (as has been before remarked,) (*Ante*, p. 133,) it seems that real actions lie only for the recovery of *immoveable corporeal hereditaments*.

The process and proceedings in writs of Formedon were much the same in the ancient practice, as in writs of Entry. The law was the same also with respect to the common incidents of real actions, such as *essoins*, *aid-prayer*, *receit*, and *voucher*. The tenant was entitled to have a *view* of the lands demanded; and, if he was an infant, to have the *parol demur*, for his nonage, in the same manner as in writs of Entry. 1. *Lil. Abr.* 632; *Brownl. R.* 154, 155. It will be sufficient, therefore, to refer to what has been before stated in relation to those particulars, (*Ante*, Chap. II & III.) without repeating it here.

In every writ of Formedon, there are two indispensable requisites to be observed. The *first* is the correct statement of the *gift*; the *other* the conveying or deducing a *title to the demandant*. If either of these was wanting, the writ was formerly considered insufficient in *substance*, and not aided by the statute of jeofails. 18 *Eliz.* ch. 14; see *Gouldsb.* 126, pl. 16, *Downall vs. Catesby*.

The *English* statute of limitations (21 Jac. I. [326] ch. 16, § 1,) provides, that all writs of Formedon in *descender*, in *remainder*, and in *reverter*, shall be sued within *twenty years* after the title and cause of action first fallen. And if any person that shall be entitled to such writs, at the time of such right or title first accrued, is within the age of *twenty-one years*, *feme covert*, *non compos mentis*, *imprisoned*, or *beyond the seas*; all such persons, and their heirs, may bring their actions *within ten years* after their full age, discovery, becoming of sound mind, enlargement out of prison, or coming into the realm, or death.

The statute of limitations, in *Massachusetts*, is the same, with only some slight verbal differences, not affecting the construction; excepting the addition, after the clause "beyond the seas," of the words, "or without the limits of the United States." *Mass. Stat.* 1786, ch. 13, § 4.

After these general remarks, it will be sufficient to notice briefly, in their order, each of the writs before mentioned.

SECT. II. The writ of FORMEDON IN THE DESCENDER, which will be first noticed, is founded upon the statute of Westminster 2, (13 Edw. I. ch. 1,) commonly called the statute *De donis condition-* [327] *alibus*;* and lies where a man gives lands to

* Notwithstanding what is said here by *Fitzherbert*, and the remark of lord *Coke*, *Co. 2 Inst.* 336, that "a Formedon in the *descender* lay not at the common law, but was given by this act, and the form of the writ is here set down," it seems that the statement is not quite accurate. For it is founded upon the supposition, that the issue had a remedy at the common law, against the alienation of his ancestor, by the writ of *Mort d'ancestor*. But as one of the three points of inquiry in this writ was *si antecessor fuit seisitus in*

another, and the heirs of *his body*; or to a man and woman, and the heirs of *their bodies*; or formerly, to a man and a woman who was cousin of the donor, [328] in *frank marriage*; by force of which gift the donee becomes seised. If the donee in any of these cases afterwards aliened the lands so given, and died, or was disseised and died, his heirs should have this writ, to recover such lands. For the statute expressly declares, that "the will of the donor, *according to the form in the deed of gift manifestly expressed*, shall be from henceforth regarded." *F. N. B.* 211.

Before this statute, all inheritances were estates *IN FEE*; that is, either fee simple *absolute*, or fee simple *conditional*. And tenants in fee simple conditional were permitted, after the birth of issue, to alien *the fee*, upon a supposition, that by the birth of issue, the condition, upon which the estate was given, was performed. But this the statute declares to be manifestly contrary to the form and intent of the gift. It therefore provides that from henceforth the will and intent of the donor should

dominico suo ut de feodo, die quo obiit, though it is certain that it might be maintained against an *abator*; it is on the other hand equally clear, that it could not be supported against a *disseisor*. *Booth*, 207. And there is one case, in which a Formedon in the *descender* seems to have been allowed at common law. It was where a man had issue a son, and then the wife died, and the husband married a second wife; and after the marriage lands were given to the husband and second wife, and to the heirs of their bodies, and they had issue of that marriage, and both husband and wife died, and a stranger abated. Here the issue of the second marriage could not maintain a writ of *Mort d'ancestor*, because another of the three points of inquiry was, *si petens sit propinquior hæres*. For the son by the second marriage could not answer this description, while there was a son by the first marriage. *Plowd.* 239; *Booth*, 141, 207.

be observed ; and that the fee should *revert to him*, for want of issue of the donee.

In construing the provisions in the statute *de donis*, which required that the *will of the donor should be observed*, and that the donee *should not have power to alien* the estate, the courts determined that the donee should not have a *fee simple* ; but that the estate should be divided, so as to give a *particular estate* to the donee, and a *reversion* to the donor. The con- [329] sequence of this construction was, that where the donee had a *fee simple conditional* before the statute, he now had *only an estate tail*. And of course the donor, who had before only a *possibility*, which the donee might utterly defeat at his pleasure, *as soon as he had issue*, had now, by the construction given to the statute, the *fee simple in expectance*, upon the determination of the estate tail, which, though *contingent*, is a *reversion*. By this division of the estate, the donee, even after issue, could not on the one hand, either bar his issue, or charge the estate with any debt or incumbrance ; nor, on the other deprive the donor of his reversion, upon failure of the issue, by any alienation, charge, or forfeiture. *Co. 2 Inst. 335.*

The effect of the statute, therefore, was not to create a *new estate*, but only to give a *new construction*. For by disaffirming the supposed *performance of the condition*, it preserved the estate to the issue, so long as there was issue to take it ; and it also preserved the *reversion to the donor*, when the issue of the donee happened to fail. The consequence of this construction was, that an estate of *inheritance* still remained in the donee. But as it was limited to a particular description of heirs, who alone were entitled to take under it ; it received the appellation of an estate *tail*,

[380] that is a *restricted* or *curtailed inheritance*,* in contradistinction from the *absolute fee simple*, which was considered as still continuing in the donor, as his reversion; unless he had limited it, by way of remainder after the estate tail, to some other person. *Wrights' Ten.* 186; *Plowd.* 251.

Another important alteration was made in the law by the statute *de donis*, in *securing* the reversion to the donor and his heirs. For by the common law, the student will recollect, *no remainder* could be limited after an estate in *fee*, whether absolute or conditional. But when estates in *fee simple conditional* were changed by the operation of this statute, into estates tail, remainders were permitted to be limited after them. And by analogy to the remedy that had been thus provided for the *issue* and the *reversioner*, a writ of Formedon in the *remainder* was now given to the remainder-man: not by force of any *express provision* of the statute, but by implication and inference. For after the dis-
[331] continuance of the estate tail, as the remainder-man was subject to the same mischief, as the issue, or the reversioner in tail, it was thought proper to give such a liberal and equitable construction to the statute, as should extend to *him* the same remedy. See *Co. Litt.* 327, a. n. 2.

Besides the *general writ of Formedon in the descender*, there were also in the ancient law, two other

* *Donationum, alia absoluta et larga, alia stricta et coarctata, sicut certis hæredibus, quibusdam a successione exclusis.* Flet. lib. iii. cap. 3, § 5; Bract. lib. ii. cap. 5, § 3.

Et ascuns autres douns sont pures et larges, et ausi ascuns autres sont estreynes, et in fourme sicome a ascuns certeynes heires, nommes en les douns, et ausi sicome de certeynes gents forpris en douns. Brit. cap. 34, § 190, fol. 89, a.

writs of Formedon in the descender, which may be denominated *special writs*.

1. The first of these writs is sometimes called a Formedon of *land held in coparcenery*. This was the remedy where an estate tail descended to several coparceners, who entered and made partition between them; and after the partition one of the coparceners made an alienation of her part of the estate, and died. In this case the survivors might maintain this writ against the alienee of the deceased coparcener.

So also, if lands held by the tenure of *Gavelkind* were entailed, and descended to several brothers, as heirs in tail to their father, and they made partition of those lands between them, and one aliened and died, the others might maintain this writ against the alienee, in the same manner as in the case of parceners before mentioned. *F. N. B.* 214. And if two coparceners who were tenants in tail made partition, and one had issue and died, and then the survivor died [332] without issue; the heir of her who first died might have this writ to recover the share of the survivor. *F. N. B.* 214. In these cases, the *writ* it seems is in *common form*; but the count must be *special*, and set forth expressly that the lands are partible. *Rast.* 366, pl. 8, 9.

2. The other special writ of Formedon in the *descender* to which we alluded is called a Formedon, *qui insimul tenuit*. This writ might be brought by one coparcener, or by one heir of *Gavelkind* lands which were entailed, where they held such lands together, not having made any partition between them. In this case, if one of the coparceners aliened her part to a stranger in fee, and died without issue, the other coparceners might have this writ against the alienee. And if one of the

coparceners, (instead of aliening her estate,) had issue and died, and either a stranger or the other coparcener *ousted* the issue, in this case the issue, or whoever was *heir in tail* of these lands, might have this writ of Formedon against the stranger, or against the other coparcener for this deforcement. *F. N. B.* 216; *Rast.* 366, b. pl. 4. And where the writ was brought by *heirs in tail* of *Gavelkind* lands, the writ was in *common form*; but the *count was special*, setting forth the custom. *F. N. B.* 217.

[333] It will doubtless occur to the student that these *special actions* must be more conformable to our *law of descents*, than the *common writ* of Formedon in the descender. And there are precedents upon the records of our courts, in the early part of the last century, (when this action was brought much more frequently than at a later period,) which bear a greater resemblance to the special count, than to the general writ of Formedon, which then continued to be occasionally used in the courts of Westminster.

The *COUNT* in a Formedon in the *descender* ought to name every heir to whom any right descended; because as the demandant is privy to the pedigree, he ought to be acquainted with every step of the descent. But it need not mention those who died in the lifetime of their ancestor, and therefore never took the estate tail. Thus, if the father, tenant in tail, discontinued the estate tail, and died, and the eldest son survived the father, and then died without issue; if the younger brother brought a Formedon in the *descender*, he ought to allege that the right descended to the elder brother, as son and heir to the father, and so to derive title to himself, *as brother and heir* to the deceased brother. But if the elder brother had died before the father, the demandant

should omit him in the count, and derive title from the father, directly to himself, as *son and* [334] *heir*; because no *right* ever descended to the eldest son, who died before his father. But there was in ancient times one distinction upon this subject, which savoured of extreme refinement. For though every son who survived his father, and held the estate tail, should be named as *son and heir* of the father; yet if the son who survived his father was never *actually seised*, (having died without making any entry upon the estate,) he was to be named in the count, but only as *son*, and not as *son and heir* of his father. *Reg.* 238, a. This distinction, however, does not seem to have been generally regarded.

The demandant must always make himself *son and heir*, or cousin (*consanguineus*,) and heir to him who was *last actually seised* by force of the entail. For if there was a later seisin of an heir in tail, than the last person named in his writ, by the demandant, it might be pleaded in abatement. It was also equally necessary that the person last actually seised should be expressly stated to be *heir* in tail to the *donee*. If it was only stated that he was *son*, and not *son and heir*, it seems that according to ancient strictness, it would have been bad upon demurrer. But notwithstanding the ancient rule above referred to, it does not seem that any exception could be taken to the count, if it named the issue, *son and heir*, instead of *son* only; though [335] he had but a seisin in law, and not an actual seisin of the entailed estate. And it is the advice of lord *Coke*, that the demandant should state every one whom he names in his writ to be *son and heir*, though they were never actually seised by force of the entail. "For thereby," he observes, "the demandant will be

certain to make himself heir, as well to the donee *per formam doni*, as to him who was last seised. 8 Co. 88, b.

With regard to the allegation of *ESPLEES*, the rule is not the same in the different kinds of writs of *Formedon*. When the writ is in the *descender*, and in the usual form, it is not necessary to allege a seisin in the *donor* by taking the profits. But such a seisin should be expressly alleged in the *donee*. *App. No. 88*. And if alleged in the donor, it is only surplusage, and will not vitiate the writ.

If a writ of *Formedon* in the *descender* is brought by the heir of the remainder-man in tail, it seems necessary to allege a seisin by taking the profits not only in the original *donee*, but in the remainder-man also. *App. No. 90*; and see *F. N. B. 214, note c*.

SECT. III. The writ of *FORMEDON IN THE REVERTER*, it has been already remarked, may be maintained by the *donor*, or by his *heir*, or the *assignee* of the reversion.

[336] Thus where one gives lands to another, or to husband and wife, *in tail*, and afterwards the donee dies without issue, or the heirs of the donee having succeeded to their ancestor, afterwards die without issue; the donor, or if he be dead, his heir, may now have a writ of *Formedon* in the *reverter*, to recover the lands so given, against him who is tenant of the freehold. And if the donor, or after his death, *his heir*, grant the reversion to another, the *grantee of the reversion* shall in the same manner have a writ of *Formedon* in the *reverter*, to recover the lands, after the estate tail is determined. *F. N. B. 219*; 8 Co. 88, *Buckmere's case*.

But if the grant of the reversion is in *tail* only, and not in *fee*, and the donee die without issue, the remedy for the grantee is by a writ of Formedon in the *remainder* and not in the *reverter*. For his estate, though called a reversion, is in truth only a *remainder*; and the *reversion* is still continuing in the donor.

This writ lay at the *common law*, before the statute *de donis*. For if the donee of an estate in *fee simple conditional*, prior to that statute, aliened the land, before the condition upon which he held it was performed by his having issue, and he afterwards died without issue, the donor of that estate, or his heirs, might have this writ. *Finch*, 89. b.

It has been before remarked, that in a writ of [337] Formedon in the *descender*, the demandant ought to name every person in the line of descent from the *donee*, because being *privy to the pedigree*, he must be acquainted with every step in the descent. *Ante*, p. 300. And in the Formedon in the *reverter*, the demandant has the *same privy* as to the pedigree derived from the *donor*. A like omission, therefore, by him, in the pedigree *on the part of the donor*, would abate the writ, if seasonably taken advantage of by a proper plea. But the demandant in this writ is not held to the same strictness with regard to the pedigree on the part of the *donee*, because he is presumed to be a stranger to it. *Dyer*, 216, a. pl. 56; *Wing. Max.* 599.

Therefore, if a man give lands in tail, and the tenant in tail have issue and die, and the issue afterwards die without issue, and without having entered; now the donor, or his heir, may have a Formedon in the *reverter*, in which he may suppose the donee to have died without issue. *F. N. B.* 220.

It is said in several books, that in the writ of Formedon in the reverter the *esplees* ought to be alleged, in both *donor and donee*. And a distinction is taken between those cases where a *fee simple* is demanded, (as it always is in a Formedon in the *reverter*,) that [338] there the taking of the profits should be alleged in *both*. But where only an estate tail is demanded, it is sufficient to allege the taking of the profits in the *donee only*. *F. N. B.* 220 ; 2 *Lutw.* 963, *Hunlock vs. Petre*. But this rule is not always observed ; and some of the precedents omit the statement of the taking of the esplees by the donee. *Rast.* 375, a. pl. 1. But the other form seems to be unquestionably the most correct. *App.* 92.

SECT. IV. A writ of FORMEDON IN THE REMAINDER, is the appropriate remedy for the *remainder-man*, where one gives lands to another *for life* or *in tail*, and the remainder to some third person in *tail* or in *fee*. In this case, if he who has the *particular* estate should die, without leaving issue which could inherit, and a stranger should intrude, and keep the remainder-man out of possession, the latter might have this action, to recover the estate from the intruder. *F. N. B.* 217.

This writ, it has been before stated, (*Ante*, p. 298,) is founded upon the *equity* of the statute *de donis conditionalibus*, and is not authorized by *express words*. For a Formedon did not lie at common law, for the recovery of a *remainder after a gift to one and the heirs of his body*. Because such a limitation, before the statute *de donis*, created what was called a *fee simple* [339] *ple conditional* : and the policy of the ancient law allowed no remainder to be limited after a fee simple, whether *conditional* or *absolute*, lest it

should lead to the establishment of a *perpetuity*. Co. 2 *Inst.* 336; *Booth*, 151.

If the remainder is limited to several heirs jointly, and one of them dies, and afterwards the survivor dies, leaving an heir, it seems this heir may maintain his Formedon in the *remainder* without stating in his writ that his ancestor survived the other joint-tenant. *F. N. B.* 219.

Though no Formedon in the *remainder* lay at common law, after a limitation of an estate in fee simple conditional, it is not certain that there was no such writ, for the recovery of a remainder, limited after an *estate for life*. *F. N. B.* 217; *Booth*, 151.

With respect to the necessity of the demandant's setting forth the whole line of the descent on the part of the donee, the same rule holds in the Formedon in the *remainder*, as was before noticed in the preceding case of the *reverter*. And it is founded upon the same reason, that the remainder-man is not privy to the pedigree of the donee, who is deemed in the law a stranger as to him.

It is said that the demandant in a Formedon in the *remainder* ought to mention all the precedent remainders in tail. 8 Co. 88, a, *Buckmere's case*. [340] And there seems to be the same reason for requiring the issue of him who had a *prior remainder* to be particularly named, which applies to the issue of the *donee*, in the Formedon in the *reverter*, who are generally, though not always, named by the demandant in his count. *App.* 92, 96. But it is contended by *Booth*, that it is not necessary to name the issue of the precedent remainder-men in the one case, or the issue of the donee in the other. *Booth*, 154.

In the writ of Formedon in the *remainder*, the taking of the *esplees* is generally alleged in the *donee* only; except in the case of a remainder created by a *devise*. But when the remainder-man claims as devisee, it is usual to allege a seisin by taking the esplees in the *testator*, and also in the *donee*. *Rast.* 369, b. pl. 1, 2, 3; *App.* 94, 96.

Some of the precedents in this action contain a *profert* of the deed "which attests the said gift in remainder." *Rast.* 369, b. pl. 1, 3. But it is said by *Fitzherbert*, that the demandant should not mention the deed in his count; though the tenant *may* demand *oyer* of it; and *if he does*, the demandant must shew it. *F. N. B.* 219.

There is one further remark, which remains to be added in relation to this writ. If the remainder is once *executed*, or in other words, if the remainder-[341] man has become actually seised of the estate tail in possession, so that the right, upon his death, descends to his heirs, they shall not have a Formedon in the *remainder*, but in the *descender*. This may perhaps be made more plain by an example. Suppose then, that A. gives lands to B. in tail, with a remainder to C. in tail, and afterwards B. dies without issue, and thereupon C. enters, and becomes actually seised of an estate tail in possession, and then aliens the estate tail *in fee*, and dies. If now the issue of C. would pursue their remedy by a writ of Formedon, to recover the estate tail, it must be in the *descender* and not in the *remainder*. For after the remainder-man becomes *actually seised* of the remainder, his situation, and that of his issue also, will be precisely the same, as if he had been the donee of the first estate tail. *F. N. B.* 219; 8 Co. 88, a; *Booth*, 152.

SECT. V. The PLEAS of the tenant to writs of Formedon may be either in ABATEMENT or in BAR. And most of the pleas in *abatement*, (which are not applicable to personal, as well as to real actions,) are the same as in writs of Entry; viz. *Alienage*, *Non-tenure*, *Sole or Entire-tenure*, *Several-tenure*, and *Disclaimer*. The same pleas may also be pleaded PUIS DARREIN CONTINUANCE, viz. *Entry of the demandant*, while the action is pending, *Marriage* of a female demandant, *Death* of a demandant, and the like. [342] It will only be necessary, therefore, to refer to the remarks which were made in relation to pleas in abatement in a preceding chapter, where they are stated and explained at some length. Chap. IV. § 17, 18. [See also the late statutes 1826, ch. 70, 1828, ch. 120, and 1828, ch. 137, § 4, there referred to.]

PLEAS IN BAR to the action of Formedon are chiefly different from those which are applicable to writs of Entry, writs of Dower, and other real actions. But with regard to two of them, *non-tenure* and *disclaimer*, the same remark may be repeated, which was made in relation to writs of Entry, and writs of Dower; (*Ante*, p. 193, 194, 276,) that though they were by the ancient practice allowed to be pleaded in *abatement only*, they may, according to the practice adopted in *Massachusetts*, be pleaded in bar, as well as in abatement, to the whole, or to any part of the tenements demanded. 14 *Mass. R.* 239, *Otis vs. Warren*; 13 *Mass. R.* 439, *Prescott vs. Hutchinson*.

The plea of *non dedit*, or *ne dona pas*, (that the donor never made the supposed gift in tail,) is a good plea in bar to all the writs of Formedon; (*Rast.* 363, b. pl. 7; *Co. Ent.* 322, b. 329, b; *Booth*, 163; *App. No.* 89,) and is considered the general issue. *Com. D.*

Pleader, 3 E. 4; 5 *Mass. R.* 465, *Dudley vs. Sumner*.

Therefore if the demandant, in a writ of *Formedon* in the *descender*, counts upon a devise in tail to his ancestor, and a descent of the *right* to himself; the tenant, if he would compel the demandant to prove his *whole title*, should plead *non dedit*, and not *non devisavit*. For though *non devisavit* is a good plea in bar, where the demandant claims under a *devise*; yet, as it is not a *general issue*, the demandant, if he takes issue upon it, will be obliged to prove *only the point in issue*, that the donor *did devise*, as alleged in the count. For this is considered so far a special plea, that the tenant, by selecting this fact, and denying it, is deemed to have admitted the truth of all the other allegations, which are material and traversable. 5 *Mass. R.* 464, 465, *Dudley vs. Sumner*.

Another plea in bar, which occurs frequently in the old books, is the plea that some ancestor of the demandant made a feoffment of the demanded premises with warranty; and that the demandant has *assets*, (that is, other lands in fee simple of equal value,) by descent from the same ancestor. *Booth*, 163; *Rast.* 361, a. b. Our common *deed of conveyance* with general warranty may be pleaded in bar in the same manner, with only a slight alteration in the language, to make it conformable to the words of conveyance in the deed. *App.*

No. 91,

[344] So also a deed of *release* or *confirmation* with general warranty, and assets by descent, may be pleaded in the same manner as a feoffment, with the exception only of the different phraseology of the instrument.

These pleas must all be pleaded with a *profert* of the deed containing the warranty. And the most usual

replications are, either a denial of *assets* by descent, (*App. No.* 91, a; *Rast.* 361, a. pl. 3; 362, a. pl. 6,) or a denial of the *deed of warranty*, by a common replication of *non est factum*. *Rast.* 362, a. pl. 5. But the demandant, instead of denying the deed, or the assets descended, may reply that *nothing passed* by the deed of the ancestor. *Rast.* 361, b. pl. 4.

The tenant may plead a *fine* in bar; and the demandant may reply, *quod partes finis nihil habuerunt*. *Booth*, 163; *Co. Ent.* 318, a. A common recovery may also be pleaded in bar to a writ of Formedon in *remainder* or *reverter*. In this case, however, there is a distinction to be noticed. If the tenant was *not seised* of the estate tail at the time of the recovery, it must be pleaded as a recovery with *double voucher*. But if he *was then seised*, the recovery would be binding, though only with *single voucher*. *Booth*, 164; and see 1 *Co.* 63, *Capell's case*. These pleas, however, and [345] several others which might be noticed, are either foreign to our practice, or rendered obsolete by the changes which have taken place in the form of legal remedies.

If the tenant found that the title of the demandant was clear and unquestionable, he generally appeared the first day, and entered his *confession* of the action upon the record, in order to avoid the *amercement*, to which he was liable when judgment was rendered against him after a *verdict*, and in some cases upon *default*.

With regard to the proceedings subsequent to the pleadings and issue, it may be sufficient to say generally, that not only the *voucher* and the *counterpleas* to the *voucher* and to the *warranty*, but the trial also, and verdict in a

writ of Formedon, were the same in the practice of the *English* courts, as in a writ of Entry. *Rast.* 376, 378.

The same remark may be applied to the JUDGMENT in this action, whether upon *confession*, *default*, or *verdict*; and whether against the *tenant*, the *vouchee*, or the *demandant*. The *Habere facias seisinam* also, as well as the judgment upon which it issued, was scarcely distinguishable in the *English* practice from the same process in a writ of Entry; and in the practice of our own courts the form is precisely the same.

[346] In a preceding page, (*Ante*, p. 80,) some notice was taken of the difference between real and personal actions, as to the conclusiveness of the judgment in a former action, upon the rights of the parties to the suit, and their representatives. But it is proper to add in this place the further remark, that in a Formedon in the *descender*, if the demandant is barred by *verdict* or *demurrer*, still the heir in tail of the demandant may have a new Formedon in the *descender*. For the heir in tail does not claim the tenements by descent from his ancestor, but by force of the statute *de donis*, and according to the form of the gift. And the feint or false pleading of his ancestor shall not be permitted to prejudice the rights of the heir, unless the suit is conducted according to all the requisites of the formal proceedings in a *common recovery*. For if the judgment against the ancestor were allowed to bar the heir *in tail*, as it does the heir *in fee simple*, the rights of the issue would be entirely at the mercy of every tenant in tail. 6 Co. 7, b, *Ferrer's case*; *Vin. Form. F.* pl. 7.

SECT. VI. The remedy by writ of Formedon has long been obsolete in *England*; (3 *Bl. Com.* 197,) and in this country it has been perhaps wholly con-
[347] fined to one section. In *Massachusetts*, while

limitations of estates tail were common, it was frequently resorted to, as the most appropriate remedy for the heir in tail, or for those, who, after the determination of the estate tail, claimed the remainder or reversion in fee. But since the statute of 1791, ch. 60, enabled tenants in tail in possession to bar their issue, and also all remainders and reversions limited after such estates, it is probable that every known estate tail has been converted into a fee simple. And that statute seems to have had the further effect, as has been before remarked, (*Ante*, p. 70, 71,) to put an end to what is denominated a *discontinuance of the freehold*, in our law. It seems, therefore, that but few cases can hereafter occur, in which a party will find it necessary to assert his claim to real property in our courts, by a writ of Formedon in the *descender*, or in the *reverter*.

The more extensive application of the writ of Formedon in the *remainder*, (which may be maintained by any *donee* or *devisee*, who is entitled to a remainder, upon the determination of an estate *for life*, as well as *in tail*,) may still retain it in use. But the practice in the *English* courts, and in the courts of our own country, seems manifestly to shew, that there are very few cases, in which this remedy is strictly *necessary*, for the vindication of the rights of any party.

The time of limitation for all the writs of Forme- [348]
don by our law, and by the law of *England*, has been already stated to be *twenty years*, after the right of the party accrued; which the student will recollect is the same period within which an *entry* may be made. And as there is now no instance, in which the right of entry can be taken away by any of those conveyances which, by the ancient law, produced a *discontinuance of the freehold*, there can be *but few cases*, in which a

party may not first *enter*, and then commence his writ of Entry upon his own seisin, instead of resorting to his writ of Formedon. Perhaps the *only case* where a party may maintain a writ of Formedon, who cannot first enter, and then bring his writ of Entry, is where the right of entry has been *tolled, within the period of twenty years*.

And this may happen, where an *abator, intruder, or disseisor* has entered and died seised, or has aliened the property, and the *alienee* has entered and died seised of it, whereby the inheritance has been cast upon his heirs. For the *common law* in these cases would not suffer the *alienees* or *heirs*, even of those who acquired the seisin by wrong, to have their title defeated by the summary method of an entry; since, however *wrongful* the seisin of the grantor or ancestor might be, the alienee and the heir were regarded as coming in by title.

[349] But by the statute of 32 H. VIII. ch. 33, the heir of the disseisor was deprived of this privilege, unless his ancestor had peaceable possession *five years after the disseisin*, without either entry or claim. *Gilb. Ten.* 21, 23; *Co. Litt.* 237, b. 238, a; *Ante.* p. 64, 65. And this restriction has been adopted, as a part of the common law of *Massachusetts*. [2 *Pick. R.* 489, *Emerson vs. Thompson*.]

It may not be useless to add, that there is one consideration in favour of adopting the remedy by an entry and action upon the demandant's own seisin, in the cases before referred to, in preference to the writ of Formedon. For the judgment in the latter action establishes the title, only from the date of the recovery; consequently the demandant, after his recovery, can maintain no action for the mesne profits. 12 *Mass. R.* 46, *Fletcher vs. McFarlane*. But on the other hand, if

he enters and then prosecutes his writ of Entry upon his own seisin, he may recover the mesne profits for the time that elapses between his entry and the final recovery of judgment. And this, in many cases of protracted litigation, may be a circumstance of some importance.

CHAPTER VII.

Writs of Right, and the proceedings therein.

[350] SECT. I. THE WRIT OF RIGHT is considered the highest writ in the law. [3 *Black. Com.* 198.] It is the *last resort* of him who has been ousted of real property ; and it lies only for the recovery of an estate in fee simple. *Co. Litt.* 326, b ; *Co. 2 Inst.* 291. It is generally resorted to, either where the right to maintain a *possessory action* is barred by lapse of time ; or where such an action having been brought, judgment has been given therein against the demandant.

But though this remedy is not often applied, where the demandant may have his writ of Entry ; yet it should be understood that it is a *concurrent* remedy with those writs, and may be brought, not only where the demandant might maintain a *possessory action*, but generally, even where he has a *right of entry*. In these cases, however, writs of Entry are usually resorted to, partly because the proceedings and trial, even in our practice, are somewhat more simple and summary ; but chiefly, that the demandant, (if by any unfore-
[351] seen occurrence he should have a verdict against him in a possessory action,) may have this final remedy in reserve.

Besides the proper, or mere writ of Right, (which, it has been already stated, lies only for the recovery of lands in fee simple, wrongfully withheld from the own-

er,) there were also, in the ancient law, several other writs, which were said to be *in the nature* of writs of Right. In some of these writs, *lands* were not demanded; but only incorporeal hereditaments. In others, though lands were demanded, it was not the *fee simple*. Several of these have been already noticed at some length; as writs of Formedon, and the writ of right of Dower. Some others have been only incidentally referred to in the preceding pages. They may all be found in the Register, (*Reg.* 1, 3, 4,) *Fitzherbert*, (*F. N. B.* 1, 6, 9, 10, 11,) and *Booth*. *Booth*, 86, 87. But nearly all of them are so foreign and different from every thing connected with our practice, that it would be of little use to the student to encumber our pages with an account of them.

At an early period of the *English* law, this writ was brought only in the *court Baron*, from whence the demandant might remove it to the *County court*, by the writ of *Tolt*, and from that court, by writ of *Pone*, to the court of *Common pleas*. The ten- [352]
ant also might remove it directly to the court of Common pleas, without first carrying it to the County court.

At a later period, when many lords discontinued the practice of holding courts, the demandant was permitted to *commence* his writ of Right in the *Common pleas*, that there might not be a failure of justice. But in order to entitle himself to pursue that course, it was necessary to insert a suggestion in his writ, that the lord of the manor had *remitted* his court to the king. And it was from this suggestion that the writ was denominated a writ of Right, *Quia dominus remisit curiam*.

This proceeding soon gave rise to a *fiction*, by which the demandant was permitted to suggest in his writ,

that his lord had *given up his court to the king*, though in truth he had not. And the court of Common pleas, that it might retain original jurisdiction in this case, found it necessary to determine, that this suggestion in the writ should not be *traversed*.

The writ of Right, when brought in the lord's court, was always a writ of Right patent; and was directed to the lord of the manor, if he was within the realm. But if the lord was absent from the kingdom, it was directed to his bailiff. *Reg. p. 1.* This writ, when sued [353] forth by the demandant, was brought by him to the steward of the court of the manor, of which the land in question was held, and there delivered to him in open court. And it is mentioned as a circumstance *peculiar* to this writ, that after the demandant has given pledges to prosecute his demand, and the steward has made an entry of it upon the proceedings of the court, the writ is re-delivered to the demandant with whom it afterwards remains. *Booth, 88.*

But when the lands were held of the king *in chief*, the action was never commenced in the court Baron; but the writ was directed to the sheriff, and made returnable into the Common pleas. This writ, after describing the lands demanded, usually contained the clause "which he holds of us in chief." But this suggestion, like that before mentioned, being inserted to give jurisdiction to the court of Common pleas, without regard to the truth of the allegation, was not allowed to be traversed.

In the modern practice, the general writ of Right is commenced in the Common pleas, and the suggestion, that the lord of the manor has given up his court to the king, is now, it is said, generally omitted. But the writ still retains its ancient name, and is usually called a writ

of Right close, *Quia dominus remisit curiam.* 2 *Saund.* 44, n. 4.

According to the present practice in *England*, [354] where the writ of Right has been much more frequently resorted to within a few years, than for a considerable preceding period, the first step is to make out a *præcipe* for the writ in this form. "*Middlesex to wit.* Command A. that justly and without delay he render to B. and M. his wife, one messuage, two gardens, and twenty acres of land with the appurtenances, in the parish of C. in Middlesex, which they claim to be the right and inheritance of the said M. Returnable in eight days of *St. Hilary.*" Upon receiving this, the cursitor makes out the writ, the form of which may be seen in the case of *Tyssen vs. Clarke.* 3 *Wils.* 558; [3 *Bl. Com. app. No. 1*, § 4.]

The proceedings being thus commenced by the suing out of the original writ, the next step to be taken by the demandant is to have the tenant summoned; and this should regularly be done upon the land. But according to modern usage, no *actual summoning* of the tenant ever takes place, either in this or in any other real action; though the sheriff still continues the formality of returning the names of the supposed summoners upon the writ.

These proceedings, and the proclamation at the door of the church, the issuing the *Grand cape*, upon the default of the tenant, the waging his [355] law of *non-summons*, or excusing his default, with the subsequent process of *attachment* and *distingas* have been before explained, (*Ante*, p. 87, 88,) and need not be here repeated. The same remark may be applied to the subject of *essoins* and other dilatory proceedings in the *English* practice, most of

which are retained at the present day. *See Ante*, p. 90, &c.

According to the present practice, the demandant does not count until after the tenant has appeared, either at the return of the writ, the adjournment day of the *essoins*, or (where the tenant has made default on that day,) on the return of the *Grand Cape*. But the tenant may always pray a *view* of the tenements, before the demandant has counted, if he sees fit. *Willes*, 344, *Davis vs. Lees*.

If no view is prayed by the tenant, the demandant next proceeds to file his *count*, the form of which may be seen in the case before referred to, and in other books. 3 *Wils.* 561 ; 2 *Saund.* 45, *note* ; 3 *Chit. Pl.* 639, &c. *Rast.* 241, b ; 246, a.

In the proceedings subsequent to the count, most of the *incidents*, which were formerly mentioned as applicable to *real actions generally*, will be found [356] to be still retained in the modern practice in writs of Right. *See* 2 *Saund.* 45, b. c. d. *note* ; 3 *Chit. Pl.* 635, &c. These proceedings the student will see, are somewhat shorter than they were in ancient times. But they are still liable to the reproach of useless prolixity, vexatious delay, and unnecessary expense to the suitors.

In the practice of this department of the law in *Massachusetts*, only one of the ancient writs of Right, (as we have already hinted, *Ante*, p. 126,) has been found necessary for the purposes of remedial justice. And there have not been wanting those, whose opinions are entitled to great respect, by whom the justice and policy of continuing even this remedy, (or at least of allowing a party who has been *cast* in the trial of a writ of Entry, to *review* his cause by way of commencing a writ of

Right,) has been thought very questionable. Experience, however, seems to show, that no great increase of litigation has arisen from this source; and perhaps a more full examination of the subject will scarcely fail to produce the impression, that *more would be lost than gained*, by abolishing this ancient institution of the common law.

It may be here remarked, that the general writ of Right which has been adopted in our practice is considered a *writ of Right close*. 2 *Wheat.* 307, *Liter vs. Green*. And so far as the distinctions [357] between that writ, and the *writ of Right patent*, are applicable to our proceedings, it may be proper to regard the *former* in the light of *precedents*, rather than the *latter*.

SECT. II. THE GENERAL OR PROPER WRIT OF RIGHT, according to the doctrines of the ancient common law, lies, as we have seen, only for the recovery of the *inheritance in fee simple*, unjustly withheld from the rightful proprietor. See *Co. Litt.* 326, b; *Co. 2 Inst.* 291. And the requisites in order to enable him to maintain the action are concisely summed up in the demandant's count, in which he alleges that either he or his ancestor was seised of the tenements demanded in the writ, "in his *demesne as of fee and right*," *in dominico suo ut de fædo et jure*. For, according to *Bracton*, it was not sufficient to allege a seisin *in dominico suo*, without adding *ut de fædo et jure*. For it ought to appear by the demandant's count, that the inheritance had been held by his ancestor or himself, not *in servitio*, or *jure possessionis*; but that the title combined the *jus possessionis* with the *jus proprietatis*, generally denominated *jus duplex*, or *droit droit*. *Brac. Lib. v. c. 5, § 2.*

[But according to *Littleton* and *Coke*, a writ of Right may be maintained by one, who, by himself or a joint-tenant, was seised of the freehold under *one estate*, and of the inheritance under *another estate*. But the inheritance, it seems, must have been expectant on a *mere freehold*, and not on an estate of inheritance, as an estate tail. And it is said, that seisin of the freehold *by wrong*, or by a title which is *defeated by a better title*, will be sufficient to maintain a writ of Right. *Litt. § 482, Co. Litt. 281, a.*]

The writ of Right, like other real actions, must be brought against him who has the freehold. 8 *Cranch*, 230. For whenever the inheritance, or even a [358] freehold is demanded against him who is *not tenant of the freehold*, he may abate the demandant's writ, as we have before seen, (*Ante*, p. 180,) by the exception of *non-tenure*. [See *Stat. 1828*, ch. 137, § 4; *ante* Chap. IV. § 17.]

In order to maintain this action, the demandant must allege and prove an *actual seisin*, either in *himself* or his *ancestor*, within the time limited by the law. Consequently, *no purchaser* can prevail, without showing an *actual seisin in himself*. The seisin of his *grantor* or *devisor* is of no avail: for the seisin of the *ancestor* required in a writ of Right, means a seisin of *that person from whom the estate came to the demandant by descent*. *Co. Litt. 293, a.* Thus where an estate was devised to A. for life, remainder to B. in fee; and B. died in the lifetime of A., so that he had only a *vested remainder*, but was never *actually seised*; and his heir brought a writ of Right. It was held that the action could not be maintained in *any form*; because neither B. nor the demandant was ever actually seised of the land. 1 *H. Black.* 1, *Dally vs. King.*

It has been already stated that the writ of Right is a remedy which lies *concurrently* with all other real actions, by which *an estate in fee simple* may be recovered. And therefore this remedy is seldom resorted to where those actions can be maintained. [359] The cases in which a writ of Right may be brought, where the demandant would be *barred of his writ of Entry* are only two; and they have been before alluded to. They are where judgment has been rendered *against the demandant* in a writ of Entry between the same parties; or the time for bringing such an action has elapsed.

1. As to the effect of a JUDGMENT AGAINST THE DEMANDANT in a former action, it seems that the ancient common law is the law of *Massachusetts* at the present day. And by that law, if the owners of particular estates of freehold, (whether tenants in *dower*, by the *curtesy*, or other tenants *for life* or *in tail*,) had judgment against them in a possessory action, upon their *non-appearance or default*, they were absolutely without remedy; because not having an estate *in fee simple*, they could not maintain a writ of Right. *Finch*, 82, b. To remove this hardship, the statute of Westminster 2, (13 *Ewd.* 1. c. 4,) provided a remedy for such persons, after their lands had been recovered against them by *default*. This remedy was by a writ denominated a *Quod ei deforciat*; which, though not *strictly* a writ of Right, was so far *in the nature* of a writ of Right, that it enabled those who had been unwarily deforced of their estates by default, to recover and restore them. And this remedy, it seems, was allowed, [360] even after *default in a writ of Right*, in the court Baron. *F. N. B.* 155. But it did not extend to those cases, where there was a recovery *after appear-*

ance and defence, in a possessory action. Such a recovery, therefore, was *always conclusive* with regard to all those estates of freehold, for which no writ of Right could be maintained. And hence we may remark, the conclusiveness of a *common recovery* upon those rights. For that proceeding is only a judgment upon a writ of Entry in the *POST*, not rendered upon a *default* of the tenant, but after a *defence*, and the *voucher of a third person to warranty*.

The writ of *Quod ei deforciat* was probably never introduced into our practice: but a sufficient substitute seems to be provided by the authority given to our courts to grant *reviews*, whenever substantial justice may require it. *Stat.* 1791, ch. 17; 1820, ch. 53.

If the *right to the possession of the fee simple* has been lost, by judgment against the rightful owner in a possessory action, he may still resort to this *ultimum refugium*, as lord *Coke* calls it. And it is of so high and forcible a nature, that, (in the language of *Blackstone*,) it overcomes all obstacles, and clears all objections, that [361] may have arisen to cloud and obscure the title.

3 *Bl. Com.* 194. And after issue is once joined in a writ of Right, the judgment is *absolutely final*; so that a recovery had in this action may be pleaded in bar of any other claim or demand, between the same parties. *F. N. B.* 6; *Co. Litt.* 158, b.

2. With regard to the LIMITATION OF A WRIT OF RIGHT, it may be remarked, that the ancient provisions of the law of *England*, having reference to the reign of a particular king, were continually changing with the efflux of time. In the time of *Glanville*, the demandant was required to allege a seisin in his ancestor or himself, in the reign of Henry the First. *Glanv. L.* ii. c. 3. By the statute of *Merton*, (20 *H. III.* c. 8,) it was changed to

the time of Henry the Second ; by the statute of *Westminster* 1, (3 *Edw.* I, c. 39,) to the time of Richard the First. And finally by the 32 *H.* VIII. c. 2, it was put upon a permanent footing, by requiring a seisin to be alleged within sixty years.

In *Massachusetts*, the limitation of writs of Right has undergone some change. By the statute of 1786, ch. 13, in conformity to the law of *England*, it was fixed at *sixty years*. But by a subsequent statute, (1807, ch. 75, § 1,) the utmost time, after which a writ of right may be now maintained, is restricted to *forty* [362] *years*; and upon the demandant's own seisin to *thirty years*. It follows, therefore, that by our law the uninterrupted seisin and possession of lands in fee simple, for the space of forty years, *where no personal disability exists*, generally gives a complete and unimpeachable title against all the world, which can neither be disturbed or drawn in question, by any dormant claim that may afterwards arise.

[It may be proper, however, to state, in this connexion, that there may be a bar to the remedy by *writ of Right*, and still a remedy may remain to the party by *entry*. Thus the husband may make a conveyance of the lands of the wife, or the husband and wife may be disseised of her lands ; and the marriage may continue more than *forty years* after such alienation or disseisin. Yet as there can be no *adverse seisin* against the wife during the coverture ; she may enter within the period limited by the statute, *after the husband's death*, though it may be sixty or seventy years from the time that possession was first acquired under the alienation or disseisin. So also, it may happen, that the remainder-man or reversioner, after one or several estates for life, may have his *right of entry* postponed, long

beyond the period limited for the bringing of a *writ of Right*. In such cases, the party whose right of entry has thus accrued, (at however late a period;) may make an entry within the time limited by the statute; and afterwards may resort to his writ of entry, or other appropriate remedy, for a complete restoration of his rights: or, in the event of his death, before his rights were restored, the seisin acquired by his entry would enable him to transmit those rights to his heirs, and leave it to them to enforce the remedy. *See 1 Prest. Abst. 266.* In these cases, if the person who has thus entered should die within thirty years from the entry, his heirs might have their election to bring a writ of Entry within thirty years, or a writ of Right within forty years. But if the ancestor lived thirty years, he being barred of his writ of Right, as well as his writ of Entry, his heir also would be forever barred of all remedy.]

SECT. III. The COUNT in a writ of Right, in the *English* courts and in our own, is very nearly the same, as in a writ of *Entry in the Quibus*. The chief difference, (except as to the time of the seisin,) is that the writ of Right omits the allegation of a disseisin in the introductory part of the count, and after the clause, *which he claims to be his right and inheritance*, adds the words "*by writ of our said lord the king of right*," which words are not contained in the count in a writ of Entry. And at the close of the count, it omits the clause in the writ of Entry, "*and the said A. still unjustly withholds the same*;" or rather it contains, in the place of that clause, the words, "*and that such is his right he offers, &c.*"* 2 *Saund.* 45, n; 3 *Chit. PL* 639; *Rast.* 246.

* This conclusion of the count was in the ancient law, an offer to maintain or prove the claim of the demandant, either by the

According to our form, the last clause is generally and very properly omitted; and the former clause is only "which he claims to be his right and inheritance, *by our writ of Right.*" *App. No. 97.* If the action is by husband and wife, in her right, the form is varied in the same manner as in a writ of Entry. *App. No. 98.*

It should be remarked, however, that though it is usual and proper *in a writ of Entry*, to allege that the demandant, or his ancestor on whose [364] seisin he counts, was seised in his demesne *as of fee and of right*; yet in this action it would be sufficient to aver a seisin *in his demesne as of fee*, without adding the words, "*and right.*" But in a *writ of Right*, as well at the present day as in the time of *Bracton*, it seems that it is not sufficient to aver a seisin *in fee*,

duel, or before the *Grand assize*. The whole sentence was thus. *Et quod tale sit jus suum, offert disrationare per corpus J. liberi hominis sui, vel alio modo, sicut curia consideraverit.* *Bract. lib. v. c. 5, § 1.*

In the time of *Glanville*, the conclusion was thus. *Et hoc paratus sum probare, per hunc liberum meum hominem J. qui hoc vidit vel audivit.* Sometimes it was more at large, thus. *Et hoc paratus sum probare, per hunc liberum meum hominem J., cui pater suus injunxit in extremis agens, in fide qua filius tenetur patri, quod si aliquando loquelam de terra illa audiret, hoc disrationare, sicut id quod pater suus vidit et audivit.* *Glanv. Lib. ii. c. 3.*

By the ancient law, the champion of the demandant was required to be a *freeman*, who had seen the demandant or his ancestor *in the seisin*, of which he was to make oath. But this was afterwards altered by the statute of Westminster 1, c. 41, which has this clause. "Because it seldom happens but that the champion of the demandant is *foresworn*, in that he sweareth that he or his father *saw the seisin of his lord or his ancestor*, and that his father commanded him to derain that right: from henceforth the champion of the demandant shall not be compelled *so to swear*: nevertheless his oath shall be kept in all other points." *See Co. 2 Inst. 246.*

without subjoining the words "*and right.*" For the foundation of the action is the claim of *the mere right* by the demandant. Besides, it is not upon the seisin, but upon *the right* that the issue is to be taken; and it is not easy to perceive how an issue can with propriety be taken *upon the right*, where no right is alleged. See *Slade vs. Dowland*, 2 Bos. & Pul. 570; 5 East, 272, S. C.; *Rast.* 246, a. pl. 2; 247, a. pl. 4.

An important point to be attended to in the count, as we have already suggested, is the statement of an ACTUAL SEISIN, either of the *demandant* or his *ancestor*, by taking the *ESPLEES* or profits of the land. And upon this point a distinction is made by *Bracton*, between a writ of Right and some of the possessory actions, as *Assize of novel disseisin*, and *Assize of mort d'ancestor*. For a person may have a freehold and a *fee*, he observes, which might be sufficient in a possessory action, without the *esplees*. But in order [365] to maintain a writ of Right, it is required that the seisin of the property should not be *momentary*; but there should be *time* to take the *esplees*; and if there was no mention of the *esplees*, the action would abate. *Brac. lib. v. c. 1, § 2.*

The same distinction with regard to *esplees*, between a possessory action and a writ of Right, is noticed by *Finch*. And he mentions the different manner in which the taking of the *esplees* should be alleged in particular cases. *Finch*, 80, b.

But these distinctions between writs of Entry and writs of Right, have long been but very little regarded. And it seems to be settled that there is now, (at least in our practice,) no difference between writs of Entry and writs of Right, with respect to the nature or kind of seisin required to maintain them. In both cases an

actual seisin, or *seisin in deed*, is necessary. But such a seisin may be acquired, not only by an *entry under title* and actual taking of the esplees; but there may also be an actual seisin in other cases, *by construction of law*, which will be effectual and sufficient for all the purposes of maintaining a writ of Right. [8 *Cranch*, 232, *Green vs. Liter*.]

Taking the esplees, therefore, is to be chiefly regarded as evidence of seisin. And when a seisin in deed is acquired, either by actual entry, or by construction of law, the taking of the esplees follows, as a necessary inference of law. Consequently, whenever he who has the title, has also seisin in deed, either by actual entry, or by intendment of law, the *esplees* may be considered as united to the title, so as to enable the party to maintain a writ of Right. 8 *Cranch*, 246, 248, *Green vs. Liter*.

It has been before remarked in relation to writs of Entry, (*Ante*, p. 137; 8 *Cranch*, 246,) that the allegation of the taking of the esplees is not traversable, or necessary to be proved on the trial. And the remark applies equally to writs of Right. It seems, therefore, that with regard to the allegation of seisin, and the taking the esplees, there is now no reason for making a distinction between writs of Entry and a writ of Right.

Another important part of the count is the DEDUCING OF THE DESCENT from the ancestor, (who is alleged to have been seised,) to the demandant. For it is an established rule of law, applicable to all real actions, that when the heir counts upon the *seisin of his ancestor*, it will not be sufficient, merely to allege the seisin of that ancestor, and to aver generally that he is his heir: but

he must set forth specially, and with correctness and accuracy, *how he is heir*. 2 *Saund.* 45, a. n.

[367] When the descent is in the right line, the deducing it from the ancestor who was seised, to the demandant, is plain and easy. But when it is necessary to go from the right line into the *transverse* or *collateral line*, it becomes more difficult. For then, instead of deducing it from father to son, a sort of *transition* must be made, thus ; “ And from the said J. S., for that he died without heirs of his body issuing, (or without issue,) the right descended and came to one T. S. as nephew and heir of the said J. S., that is to say, as son and heir to one H. S. who was brother of the said J. S.”

If, in deducing this title, any statement is made which appears upon the face of the count *impossible and repugnant*, or *contradictory* and *incapable of being proved*, it will be bad upon demurrer ; and if a judgment is obtained in such a case, by the demandant, upon default of the tenant, it will be erroneous. On the other hand, if the pedigree is *misstated* in the count, as by deriving the *descent of the right*, through a wrong line of ancestors, it seems that the mistake will produce a *variance*, which will be fatal, upon the trial. See 2 *Bos. & Pul.* 570, *Slade vs. Dowland*.

By the ancient law, the demandant might bring one writ of *Right patent*, in the lord's court, against divers tenants who held by distinct titles, and then [368] count against them severally. And this proceeding may now have the appearance of transforming one into several actions. But the student will readily perceive that it was not so in fact ; when it is recollected that the writ of *Right patent* was only an open *letter* or *commission*, addressed by the king to the

lord of the manor, giving him authority to take cognizance of the complaint of the demandant; and commanding him to do justice between the demandant, and those against whom he complained.

This writ, as we have seen, was only shewn to the steward of the lord's court, and then returned to the demandant. The tenants never saw the writ, (which was addressed to the lord, and not to them;) and they were summoned severally by the bailiff of the court. To them, therefore, each summons was the commencement of a separate action. And each tenant answered only for the lands held by himself, in the same manner, as if they had been sued by several writs of *Right close*, in the Common pleas.

There is nothing analogous to this in our practice, in which the count constitutes a part of the writ; and one writ can lay the foundation for only one action. If, therefore, several tenants, claiming distinct parcels by different titles, are, in our courts, joined in one writ of Right, they may plead *sole* or *several-tenure* in abatement of the writ. But if they should omit to plead this matter *in abatement*, and should join the mise, it [369] would amount to an admission in law that they were joint-tenants of the whole, and the jury might give a general verdict for the demandant, and *against them jointly*. 2 *Wheat.* 307, *Green vs. Liler*.

SECT. IV. The writ of Right in *Massachusetts* is sued forth and served in the same manner as a writ of Entry. And the tenant may plead the same pleas in abatement, which were mentioned in a former chapter, as applicable to that action. *Ante*, ch. iv. § 17. It seems sufficient, therefore, to refer to what was there stated, without repeating it here.

We have just seen that if several persons, who hold separate parcels by distinct titles, are sued jointly, they cannot take the exception, *after joining the mise*, but must plead *sole-tenure* or *several-tenure* in abatement. And if the demandant should demand more land against a tenant, than he holds, the latter may plead non-tenure, and abate the writ as to the parcel he does not hold.

By the ancient common law, such a plea, if found true, would have abated the *whole writ*. But the statute of 25 *Edw. III.* c. 6, remedied this hardship, by providing that the writ in such a case should abate *only as to the parcel*, whereof non-tenure was pleaded, [370] and admitted or proved. And this provision of the statute we have adopted, as a part of our common law. 8 *Cran.* 242, *Green vs. Liler*.

Though a writ of Right may be brought against any tenant of the *freehold*, as we have before seen; yet as this action draws in question, not only the title to the freehold, but the *absolute and rightful ownership of the inheritance*; if the tenant is seised only of *an estate for life*, he ought to *pray in aid* him who has the *reversion* or *remainder*, *in tail* or *in fee*, to aid him in defending the inheritance. And by the ancient law, if the tenant for life failed to do so, it seems that he strictly incurred a forfeiture of his estate.

The PRAYER OF AID by the tenant, and the allowance or grant of it by the court, were entered at large upon the record. See 3 *Chit. Pl.* 645; 2 *Saund.* 45, c. n; *Rast.* 27, a. And thereupon a judicial writ, called a *summons ad auxiliandum*, or *ad jungendum auxilium* was sued forth by the tenant, upon which the proceedings followed which have been before pointed out. *Ante*, p. 96; *App. No.* 41.

Aid-prayer, (as has been already intimated,) is seldom if ever resorted to in our practice, *except in writs of Right*. But in writs of Entry, when prosecuted against those who are only tenants for life, they generally do, and *alivays should*, apprise him who is [371] entitled to the *remainder or reversion in fee*, of the pendency of the action, that he may advise and aid in the defence, if he sees fit.

Aid-prayer is considered a dilatory plea, and in *England*, must not only be verified by affidavit, but must also be pleaded before a general imparlance. 2 *Bos. & Pul.* 384, *Onslow vs. Smith*. And perhaps it ought strictly to be so considered with us; but the practice seems to have been otherwise. With respect to this part of the proceedings in a writ of Right, there appears, indeed, to be no settled practice in *Massachusetts*.

A SPECIAL PLEA IN BAR is very seldom pleaded by the tenant in a writ of Right, either here, or in *England*. But there are several pleas which may be so pleaded at the election of the tenant; as that the ancestor of the demandant, upon whose seisin he counts, *devised the lands* for which the action is brought; or that a fine has been levied, and the like. *Booth*, 112. The tenant may also plead in bar, by *denying the seisin of the ancestor*, or *the descent of the right to the heir*, as set forth in the count. 3 *Chit. Pl.* 564, 565; *App. No.* 99. [And the allowance or disallowance of additional pleas, *besides the mise*, (as it is called,) to be pleaded by the tenant in a writ of Right, is matter of discretion in the court; and therefore, if refused, is not assignable as error. 2 *Wheat.* 306.] But it is generally considered more advantageous for the tenant, to *join the mise, upon the mere right*; which is, in effect, pleading the general issue. Yet *there may be cases*, in which it will be advis-

able for the tenant to plead a special plea in bar, [372] instead of joining the *mise* upon the mere right ; particularly where the point to be tried would be more simple, and he is *quite sure* of being able to make out his defence.

When the *mise* is thus joined, *every thing* (according to the ancient doctrines of the law,) which could avail the tenant in his defence, *except collateral warranty*, might be given in evidence under it. *Booth*, 98, 114 ; *Bro. Droit*, 48 ; [7 *Wheat.* 31, *Green vs. Watkins* ; 3 *Pet.* 133, *Inglis vs. Trustees, &c.* ; 7 *Cowen*, 52, *Ten Eyck vs. Waterberry* ; 3 *Wils.* 420.] The reason for requiring a *collateral warranty* to be specially pleaded seems to be, because it does not prove any right in the tenant, but only operates as an *estoppel*, which bars the claim of the demandant. *Co. Litt.* § 478 ; *Booth*, 114, 115. But the inquiry as to these reasons and distinctions, is of but little practical importance with us, if, as has been intimated in another place, (*Ante*, p. 39,) collateral warranty has no existence, or rather *no operation* in our law.

Formerly it seems to have been required, that the *mise* upon the mere right should be joined by the tenant himself, and not by his attorney. *Finch*, 88, a. But this rule has long been disregarded. 3 *Wils.* 561 ; 3 *Chit. Pl.* 654.

When the *prayer in aid* came into court upon the summons being served upon him, *he joined the* [373] *mise with the tenant*. But if he made default, the demandant was not to be delayed ; and there was a judgment or award of the court that the tenant should answer alone. 2 *Saund.* 45, d. n.

It is proper to add, that though the submitting to the assize or jury the question of *mere right* is denominated

joining the mise, and sometimes *joining in right*, it is not, as it seems, *necessary*, nor was it formerly *usual* in the *English* courts, for the demandant to join the issue; but the trial proceeded upon the answer of the tenant only. *Rast.* 246, a. pl. 2; 247, a. But the demandant sometimes replied, that the tenant *unjustly defended the right of the demandant*, and the seisin of the ancestor upon whose seisin he counted; and then averred again the seisin of his ancestor, and his own *right*, as alleged before in his count, and put himself upon the grand assize. *Rast.* 241, b. pl. 1.

In the modern practice in *England*, it seems that *neither* of the preceding forms is adopted. But after the tenant has put himself upon the grand assize, in the manner before mentioned, the demandant joins the issue as in any other real action. 3 *Wils.* 562, 563; 3 *Chit. Pl.* 652, 654; *App. No.* 100.

SECT. V. In the practice of the *English* courts, there are two modes of TRIAL at the [374] present day: 1. By the grand assize, where the *mise* has been joined upon the mere right; and 2. By a common jury, where issue is joined upon a collateral point, arising out of some other plea.

But besides these two kinds of trial, it is well known that in the early times of the common law, when the best right was generally *the right of the strongest*, the decision of the most important legal controversies was referred to the sword, to be determined by the *duel*, or, as it was generally denominated, the *trial by battle*. This species of trial, (which seems to have originated from the martial character, and partly, perhaps, from the superstitions of that age,) was common to the nations of northern Europe. It was brought into *England* by *William the Conqueror*; and was the only mode of trial in

a writ of Right, until the *grand assize* was introduced by consent of parliament in the reign of Henry II. This was probably done by the advice of *Glanville*, who denominates it *Regale quoddam beneficium*. *Glanv.* L. ii. c. 7.

But after the introduction of the *grand assize*, the tenant had still the right of electing a trial by battle. It was necessary, therefore, for the demandant to be prepared with his *champions*. For this trial was [375] always by champions, (who were required to be *freemen*,) and not by the parties to the action. And this is the reason that the tenant, though an *infant*, might join the *mise*, and try it by battle. But he could not wage battle in an *appeal*, because *there* the duel must have been fought by the party himself. *Finch*, 88, a.

This mode of trial has long been obsolete even in *England*; the last battle waged in the court of *Common pleas* having been in the thirteenth year of queen *Elizabeth*, 1571. See *Dyer*, 301; 3 *Bl. Com.* 337. But though it had been so long *disused*, the trial by battle was not finally *abolished* until the year 1817.

The GRAND ASSIZE, as anciently established, is a jury of four knights, joined to twelve other persons: and the twelve other jurors are chosen by the four knights. For the mere right cannot be tried by a common jury, *though both parties desire it*. 1 *Bos. & Pul.* 192, *Galton vs. Harvey*. When the *mise* is joined, the first process is a writ of *summons* to four knights to appear and choose the grand assize. And this writ, when the trial is to be at the *assizes*, must be in the *alternative*, to summon the four knights *into bank*, as it is called, that is, to appear at the bar of the Common pleas; *or* at the *assizes*, if the judges shall come there before the *day in bank*.

After the knights have appeared, and chosen themselves and *twenty* others a jury, it is still [376] necessary to sue out a *Venire facias*, and sometimes a *Habeas corpora recognitorum*. If the four knights do not appear on the first writ of summons, the demandant may have an *alias* or *pluries* summons; or, at his election, a *Habeas corpora quatuor militum*, in the *alternative*, as in the writ of summons. See 3 *Wils.* 359; 3 *Chit. Pl.* 636; 2 *Saund.* 45, e. n.

It was at one time doubted whether a writ of Right could be tried at the *assizes*, or any where but at the bar of the court of Common Pleas. 2 *Bl.* 1261, 1293, *Luke vs. Harris*. But there does not appear to have been any good grounds for the doubt; and the practice has been of late years established beyond question.

If there are not four knights in the county, the sheriff is to return other persons. But according to *Dalton*, they shall be returned as *knights*, and come to the bar with their swords. *Dalt. Sheriff*, 64. And lord *Coke* says, that when the knights come to the bar, they cannot be challenged, though the other twelve jurors may be. *Co. Litt.* 294, a.

When the recognitors appear, the oath, which may be seen in *Littleton*, (§ 514; 3 *Wils.* 561,) is administered to sixteen, after the challenges are disposed of. But in one case it is said that this oath was ad- [377] ministered *only to the four knights*, "and the rest of the jurors were sworn in the same manner as in other actions." 3 *Leon.* 162, *Heidon vs. Ibgrave*.

Generally much time is consumed after the first summoning of the knights, by the several writs of summons and other process before mentioned. So that by the previous delays arising from *essoins*, *aid-prayers*, and *vouchers*, in the earlier stages of the cause, with the

time consumed in the manner just stated, in forming and completing the panel of the grand assize, the tenant, in the *English* courts, may generally put off the trial, even for years, if he does not succeed, (as often happens, from the technical objections allowed in this action,) in wholly defeating the claim of the demandant. See 2 *Bos. & Pul.* 570, *Dowland vs. Slade*; 5 *East*, 272, *S. C.*; 3 *Bos. & Pul.* 453, *Dunsday vs. Hughes*; 1 *Taunt.* 415, *Pearson vs. Maynard*. When the grand assize appears and is sworn, the tenant first gives his [378] evidence;* and the reason assigned is, that the *mise* is first *prayed for* and joined by him, as by a demandant in other real actions. *Booth* 98; 3 *Leon.* 162, *Heidon vs. Ibgrave*; [*See* 3 *Pet.* 112.] But it is said, that if the tenant tenders the *demey-mark* in court at the time of the trial, the demandant must then begin. *Booth*, 98; *Litt.* § 514; *Co. Litt.* 294, b.†

* In a copy of *Booth*, which the author has, there is the following MS. note by the late Mr. Baron *Hotham*, (to whom it formerly belonged,) in p. 98, referring to the remark in the text, that *the tenant shall first begin his evidence in a writ of Right*. "So held by me on the trial of a writ of Right at *Exeter* in the Spring 1780, wherein one *Luke* was the demandant, and *Honor Harris* the tenant. But the demandant, (who had no counsel, and who was apprised by me of the advantage he was giving his adversary, by going first into his title,) pressing to begin, I suffered him to begin. (H.)"

† THE TENDER OF THE DEMY-MARK, as it is called, has long been a "stumbling block" with lawyers. Mr. *Reeves* gives from *Bracton*, the following account of this proceeding.

"If his ancestor happened not to be seised in the time of the king mentioned in the writ, although he was seised in another king's reign, yet the demandant might perhaps fail through this error, the same as if he had never been seised at all. But the issue to be tried by the great assize being, which of the parties had most right; the king's time did not properly come within the considera-

It was remarked in a preceding page, that when an issue arose upon some collateral point in a writ of Right, the trial was had before a common jury, as in other real actions. With regard to this mode of [379] trial, therefore, no further remarks seem to be required.

The practice in the courts of *New York* in relation to this action, is established upon the *English* model. The four persons who are there appointed to represent the four knights, are severally sworn "lawfully and truly to choose, in the presence of the parties, in addition to themselves, *twenty* other good and lawful men of the

tion of the recognitors; and the right between the parties might be decided with justice in favour of the demandant, although he had failed in the time of seisin mentioned in his count: when, therefore, the demandant had put himself on the great assize, and the tenant had suspicion that the ancestor was not really seised at the time mentioned in the count; as perhaps he was not born, or was dead at the time; he used to pray that the time of seisin might be inquired of by the recognitors; and to obtain the favour of this extraordinary inquiry, it was the practice for the tenant to give something, *dare de suo*, as Bracton calls it; this being probably, a remnant of the old custom of putting justice to sale; an abuse which was long permitted, and made a gain of by our kings, and was at last provided against by a clause in the famous charter of the great charter."

Mr. *Reeves* and other *legal antiquarians* have regretted that Bracton, who has opened and explained so many secrets of ancient jurisprudence, should not have been more explicit and unambiguous with regard to this particular. *Brac. lib. v. c. 5. § 3*; 1 *Reeves' Hist.* 429; *Booth*, 98.

The tender of the *demy-mark* was generally subjoined by the tenant to the joinder of the mise upon the mere right; and not only the form is still retained in some modern *English* precedents, but it is said the practice is to tender the money at the trial. *See 3 Chit. Pl.* 653, 654. It is scarcely necessary to add, that nothing of this nature is known in our practice.

county, who best know and will declare the truth between the parties, to make recognition of the grand assize. And the qualifications of the recognitors, as well as some of the grounds of challenge, are also prescribed by statute. 1 *Rev. L.* 43. The subsequent proceedings are also in a great measure conformable to the practice of the *English* courts.

In *Massachusetts* no tribunal has been established in imitation of the grand assize. The same process is used in commencing a writ of Entry and a writ of Right. The qualifications of the jurors are the same, and they are impanelled and sworn in the same manner. Indeed every part of the trial is conducted as in other real actions, with the single exception, that when the *mise is joined upon the mere right*, the tenant first gives his title in evidence, according to the ancient practice; unless the demandant waives that privilege, which he often does, that he may have the advantage of *closing the argument*.

SECT. VI. As to the EVIDENCE in a writ of Right, it has been already stated, (*Ante*, p. 320.) that where the *mise is joined upon the mere right*, the demandant, in order to maintain his action, must prove an *actual seisin* in *himself*, or the *ancestor* named in his count, from whom the *inheritance came to him by descent*. *Co. Litt.* 293, a; 1 *H. Black.* 11, *Dally vs. King*. For though the tenant, as we have seen, (*Ante* p. 320,) may *deny the seisin of the demandant by a special plea*: yet it seems that where the *mise is joined upon the mere right*, if the demandant does not *prove the seisin* [381] of his ancestor, and *within the time mentioned in his count*, the tenant will be entitled to a verdict.*

* In the copy of *Booth*, before mentioned, (*ante*, p. 336, note *) there is the following note of Baron *Hotham*, referring to the state-

See 6 Mass. R. 356, *Newhall vs. Hopkins*; 1 H. Black. 1 *Dally vs. King*.

[And the tenant, for the purpose of disproving the demandant's seisin, may give in evidence the title of a third person. For as the writ of Right brings into controversy the *mere right* of the parties, it consequently allows either party to establish by legal evidence, that his adversary *has no right* in the demanded premises; or that his mere right is *inferior* to that which is set up against it. 3 Pet. 133, *Inglis vs. Trustees of the Sailor's Snug Harbour*; 7 Wheat. 31, *Green vs. Watkins*; 10 Mass. 131, *Poor vs. Robinson*; 7 Cowen 52, *Ten. Eyck vs. Waterberry*. But where the demandant proves an actual seisin, by a *pedis positio*, the tenant cannot be permitted to prove a superior *outstanding title*, since it would not disprove the actual seisin. But where the demandant relies upon a *constructive* actual seisin, as a *patent from a State* of vacant lands, the tenant may show a previous grant from the State; for that divests the title of the State, and so disproves the demandant's constructive seisin. 7 Wheat. 27, *Green vs. Watkins*.]

The student should bear in mind that evidence of seisin in a writ of Right, as well as in other real actions, need not in all cases be established by an actual *pedis positio*. *Ante*, p. 167. For taking of *esplees* is but *evidence of seisin*; and a seisin *in deed* being once estab-

ment, (page 98,) *that if the grand assize, AFTER THE TENDER OF THE DEMY-MARK, find not the seisin as it is alleged, they ought not to inquire any further of the right.* "So held also by me in the above case. And the demandant not being able to prove the seisin of his ancestor, as he had alleged in his count, I directed the jury to find for the tenant. Luke afterwards moved the Common Pleas for a new trial, on the ground of this being a misdirection in me; but it was refused *per Curiam*. (H.)"

lished, either by an actual entry upon the land, or by construction of law, the taking of the esplees follows as a necessary inference of law. And this is the doctrine of *Bracton*.* Therefore where lands are in lease for years, there may be a tenancy, by the curtesy, [382] without an entry, or even the *receipt of rent*; and yet *curtesy* depends upon actual seisin. 8 *Cranch*, 246, *Green vs. Liter*.

So where lands are granted by *letters patent*, no livery of seisin was ever necessary to perfect the title. For the grantee in such case takes by *matter of record*; and the law deems a grant of record to be of equal notoriety with an actual delivery of the seisin in the presence of the *vicinage*.

It is expressly held in *Barwick's case*, (5 Co. 94,) that letters patent do not convey *a mere seisin in law*, (like the estate which the heir has by descent before entry,) but a *livery in law*; that is, such a livery as confers a constructive *actual seisin* of the land.

It is upon the same principle, that if a feoffment was made of divers parcels of land in the same county, *livery of seisin* of one parcel, in the name of the whole, was always held to confer a seisin of all the parcels, where they were not at the time held by an adverse seisin. In like manner, if a grantee or heir, of several parcels of land in the same county, enter upon one parcel *in the name of the whole*, where there is no conflicting possession, the law deems him to be in the *actual seisin of the whole*. The same doctrine applies to what is de-

* *Poterit enim quis habere liberum tenementum ex traditione, quamvis statim non utatur, nec expletia capiantur, quia usus et expletia non multum operantur ad donationem; valent tamen multotiens ad possessionis declarationem, et dici poterunt vestimenta donationis.* *Brac.* lib. ii. c. 18, § 2, fol. 40.

nominated a *possessio fratris*, and to the making of *livery within view* or *claiming* lands, held adverse- [383]
ly by another, where the rightful owner cannot enter, for fear of bodily harm. 8 Cran. 247, *Green vs. Lister*.

Generally a conveyance of waste and vacant lands gives a *constructive actual seisin thereof* to the grantee, without entry, so as to enable him to maintain a writ of Right. And if a man enter into lands having title, his seisin is not limited to his actual occupancy; but shall be deemed co-extensive with his title. Therefore if a person having title to lands in possession of one tenant, enter into any part, *in the name of the whole*, he will be adjudged to be in the seisin of the whole, notwithstanding an adverse seisin thereof by the tenant. But if several tenants are in the seisin of distinct parcels, claiming to hold in severalty, there must be an entry into some part of the parcel held by each tenant. Upon the same principle, an entry into a parcel which is vacant, in the name of the whole, will *not* regain the seisin of a parcel that is in an adverse seisin. But an entry into the parcel which is in an adverse seisin, in the name of the whole, *will enure as an entry into the other part also*. *Ibid.* 250.

Where *two persons* are at the same time in possession of the same land by *different titles*, the law adjudges him to have the seisin, who has the *better title*. For there may be a concurrent possession- [384]
seisin, though there cannot be a concurrent seisin; and therefore the seisin shall follow the better title. And where different portions of the same lands are claimed under different titles, and each party claims seisin and possession to the extent of his title, in virtue of actual seisin of a part, the law adjudges the seisin of

the unoccupied part to him who has the better title. Consequently the disseisin of him who has the better title, by him who has the inferior title, does not extend *beyond the limits of the occupancy of the latter*. 4 *Wheat*. 113, *Barr vs. Gratz*; 3 *Mass. R.* 215, *Langdon vs. Potter*; 10 *Mass. R.* 146, *Codman vs. Winslow*.

If the demandant release to the tenant *after the commencement of the action*, this need not be pleaded *puis darrein continuance* but may be given *in evidence*, in a writ of Right, notwithstanding the rule that the cause is to be tried, according to the situation of the parties at the time it was commenced. 10 *Mass. R.* 134, *Poor vs. Robinson*.

[385] On the trial of a writ of Right, proof of *possession of the lands*, and *pernancy of the rents and profits*, were held to be *prima facie* evidence of a *seisin in fee*. But proof on the other side of *forty years'* subsequent possession by a *daughter*, while the *son and heir* lived near, and well knew the fact, was considered *much stronger evidence*, that the first possessor had only a *particular estate*. 5 *Taunt.* 326, *Jayne vs. Price*; 1 *Marsh.* 68, *S. C.* And this decision is founded upon the principle referred to in a former chapter, (*Ante*, p. 213,) that every person shall be presumed to act conformably to his rights and duties, until the contrary is made to appear.

SECT. VII. The VERDICT in a writ of right should of course conform to the issue submitted to the jury, as in other actions. When the *mise* is joined upon the mere right, the verdict for the demandant generally finds "that the said B. hath more mere right to *have* the said tenements, with the appurtenances, to him and his heirs, as he hath above demanded the same, than the said A. to *hold* the same, as he now holdeth them; as the said

B. by his aforesaid writ hath above supposed." If for the tenant, it is "that the said A hath more mere right to *hold* the said tenements, with the appurtenances, to him and his heirs, as he now holdeth the [386] same, then the said B. to *have* them, as he hath demanded the same by his aforesaid writ." *Booth*, 105, 106. Sometimes the form is, that the demandant or tenant hath *greater title*, instead of *more mere right*, to hold, &c. See 3 *Chit. Pl.* 666 ; 3 *Wils.* 563.

Where several tenants, who are sued jointly, neglect to plead *several-tenure to the writ*, but join the mise severally, as to the tenements held by them respectively, parcel of the demanded premises ; the verdict, if for the demandant, may be *general*, that he hath more mere right to have the same than the tenants ; and if for the tenants, as to any of the parcels held by them, that they have more mere right to hold the same, than the demandant. 8 *Cran.* 250, *Green vs. Liter.*

In the trial of the issue upon the mere right, much must of necessity be left to the *assize* or *jury*. And this may be the reason for providing a more numerous, as well as a more select panel, for the decision of this question, than for others of less importance and difficulty. But it can scarcely be doubted, that the chief reason for providing such a tribunal as the grand assize, and especially for giving it the martial and imposing appearance which it assumed, must have been in compliance with the taste and character of the age, [387] and with a view to induce the suitors to waive their right to a *trial by battle*.

After the mise was joined upon the mere right, the verdict of the jury, (even though given upon another point,) was conclusive upon the rights of the parties. And if the tenant suffered a default, or the demandant

became nonsuit, it was equally peremptory and conclusive. *Co. Litt.* 295, a; *Booth*, 101; 2 *Saund.* 45, f. n.

The FINAL JUDGMENT in a writ of Right in favour of the demandant, whether upon a verdict, or the default of the tenant, is in this form. "Therefore it is considered that the said B. recover his seisin against the said A. of the tenements aforesaid, with the appurtenances, to hold to him and his heirs, quit of the said A. and his heirs forever." For the tenant it is thus. "Therefore it is considered that the said B. take nothing by his writ; and that the said A. go thereof without day: and that the said A. hold the tenements aforesaid, with the appurtenances, to him and his heirs, quit of the said B. and his heirs forever." See 3 *Wils.* 563; 3 *Chit. Pl.* 667; 2 *Saund.* 45, f. g. *note*. When the action is either by or against husband and wife, in her right, the last clause of the judgment is thus. "And that the said B. and M. his wife hold the tenements afore- [338] said, with the appurtenances, to them the said B. and M., and to the heirs of the said M., quit of the said A. forever."

At the common law, there were no costs in any real action. And as no damages are recovered in these actions, neither the demandant nor the tenant is entitled to costs in a writ of Right, in *England*, by the statute of *Gloucester*, or any other statute. 10 *Co.* 116, *Pilford's case*. In *Massachusetts*, the law is the same in regard to costs in *real* and in *personal* actions; the statute of 1784, ch. 28, § 9, having provided that in *all actions* the party prevailing shall be entitled to his legal costs against the other.

After judgment for the demandant, a writ of EXECUTION issues, denominated a *habere facias seisinam*, in the form and manner already explained in treating of

writs of Entry. *Ante*, p. 220. This writ being executed by the sheriff's delivering seisin of the tenements recovered to the demandant, and the writ being returned and filed with the Clerk of the Court from whence it issued, the title of the demandant is now finally established by the highest sanction which the law can give. 5 *Greenl.* 62.

CHAPTER VIII.

Action of Trespass for Mesne Profits.

[389] SECT. I. It has been mentioned in a former chapter, (Ch. IV, § 23,) that although the demandant, according to the *modern* practice, can recover no damages in a writ of Entry, yet he is not in all cases without remedy for the injury he may have sustained, in consequence of being deprived of the use of his property by the tenant. For if, at the time he commenced his *writ of Entry*, he had a *legal right of entry* into the land in question, he may, *after he has recovered judgment for his seisin*, maintain an action of *trespass FOR THE DISSEISIN*, or, as it is more usually called, the *MESNE PROFITS*.

It is important, therefore, to explain to the student the nature and application of this *supplementary remedy*; though it does not strictly constitute a part of the *LAW OF REAL ACTIONS*. Besides, the ancient law upon this subject has undergone a remarkable change, which will render the brief inquiry which it is proposed to make in relation to it, the more interesting to the inquisitive student.

[390] Before the statute of *Marlbridge*, (52 H. III. c. 16,) and of *Gloucester*, (6 Edw. I. c. 1,) *no damages* were recoverable in any real action but *Assize of novel disseisin*. And even in the Assize, damages could be recovered only against the disseisor. In con-

sequence of this restriction, the object of the law was almost entirely evaded. For, in order to deprive the disseisee of the damages, it became a common practice for *persons who were poor* to commit disseisins, and to make feoffments to others, who might hold the estate without being answerable to the disseisee in damages. When the disseisee recovered judgment, he often found his remedy fruitless; for the disseisor was now out of possession, and had nothing whereby the damages could be satisfied.

The statute of *Gloucester* therefore provided, that the *tenant* should be liable to the disseisee for the damages, *if the disseisor was unable to satisfy them*. But it seems to have been necessary for the disseisee to allege, either in his writ, or by some suggestion upon the record, before the judgment was rendered, that the disseisor had nothing by which the damages could be satisfied. In construing the statute, it was held that the damages should still be *recovered against the disseisor*, if he was able to satisfy them. If he was unable, to satisfy but a part of the damages, the tenant should [391] be answerable for the residue. But he was not to be liable for any damages anterior to the time he took the possession and profits. *Co. 2 Inst. 284.*

The statute of *Gloucester* not only gave damages in the writ of Assize, against the *tenant* as well as the *disseisor*: it extended the remedy to *several possessory ancestrel writs*, as *Mort d'ancestor*, *Ayel*, *Besayet* and *Cosinage*; and also to *writs of Entry* upon a *disseisin* or *intrusion*.

In the *ancestrel writs*, damages were recoverable only from the death of the immediate ancestor, from whom the right descended to the demandant. But in writs of *Entry*, (whether against an *abator*, *intruder* or *disseisor*,

or against their heirs or grantees,) the damages were recovered from the time of the disseisin to the time of the inquisition or verdict; and not merely to the commencement of the suit, as in most personal actions. For the land was regarded as the *principal object* of the suit; and the damages only as *accessory*, like the interest of money in an action of debt.

In writs of Entry the *whole damages* were recovered against the tenant, though there might have been several intermediate tenants between him and the [392] disseisor. If the action was against the *alienee* of the disseisor, damages could be recovered only where it was brought by the disseisee. When the demandant was *heir of the disseisee*, though he might recover his *seisin* in a writ of Entry in the *PER*, the *PER* and *CUR*, and the *POST*, against the alienee of the disseisor, he could recover *no damages*. But against the disseisor, the heir of the disseisee might recover *damages* with his *seisin*. The damages, however, which the *heir* was entitled to recover, even against the disseisor, (as in the ancestrel actions before mentioned,) were to be estimated only from the death of the ancestor; for the heir could have no claim to damages before the right was cast upon him by the descent. *Co. 2 Inst.* 286.

It is proper to remark, however, that the statute of *Gloucester* subjected the tenant to damages in a writ of Entry, *only when he had the seisin by his own act or consent*. If the seisin was thrown upon him by act of law, without any act or default of his own, he might show the special matter by his plea, and thus protect himself from liability to damages.

Thus, though the alienee would be liable to damages, because he acquired the seisin by his own act; yet, if

he died, and the seisin was cast upon his heir, who refused to enter and take the profits, he [393] might plead this matter in excuse, and thus protect himself from liability for the damages. So if the disseisor made a deed of feoffment to A. and B. and livery and seisin to A. only, in the name of both, (B. never having agreed to the feoffment, nor taken the profits of the land;) if A. died, so that the seisin was cast upon B. as survivor, against whom a writ of Entry in the PER was brought, B. might plead the special matter, and thus excuse himself from damages. *Co. 2 Inst.* 286, 287.

With regard to the nature and extent of the damages, and the manner in which they were to be estimated, the statute of *Gloucester* made no change; but only gave the demandant costs, in addition to his damages. It is to *Bracton*, therefore, that we are to refer for information upon this subject; and his statement of the ancient law upon this point, will be found to be very full and satisfactory. A brief sketch of it, however, will be all that is necessary for our present purpose.

The jurors were diligently to enquire what profits the disseisor had received, in fruits, corn, rents, and other commodities. They were also to estimate the advantages the disseisee might have derived from the estate, if he had not been disseised. The disseisor was liable, not only for what he had disposed of, or appropriated to his own use; but for whatever [394] had perished or been destroyed by accident. If the beasts died after the disseisin, says *Bracton*, the disseisor should be answerable for them; for though he might thereby suffer damage, that was not to be imputed to the disseisee. And if the buildings were consumed by fire, after the disseisin, the price, he observes,

ought to be restored by the *Assize*, because the disseisor was answerable, *even for accidental losses*. *Brac.* lib. iv. c. 19, § 9.

The damages assessed by the jury, might be reduced by the judges, if they were *excessive*; but they were never to be increased by them, unless they had *certain knowledge* that they were assessed at a *less sum than was right*. In that case they might increase them. For it would be very wrong, says *Bracton*, that the disseisor should make profit to himself, by the injury he did to another. And he adds a remark, which explains the occasion of passing the statute of *Gloucester*: "That there were many barons and other great men, who often committed disseisins, which they would not have done but for the *hope of lucre*. For when they had taken the issues and profits of the land for a long time, amounting to a large sum, they expected to escape with a *small amercement*, and save the residue to themselves; [395] because the jurors when they awarded the recovery of the tenements *against the disseisors*, were very often unwilling to assess heavy damages against them, hoping in that way to *pacify both parties*." *Brdc.* lib. iv. c. 19, § 8,

It was a question in the time of *Bracton*, whether the improvement or amelioration of the premises by the disseisor, ought to be taken into consideration, in assessing the damages. After stating the arguments on each side, he concludes thus; *Sed revera, melioratio minuit damna, et exonerat disseysitorem in parte, et aliquando in toto*. *Brac. ubi. sup.* § 9.

[In the Supreme Court of the United States, the law upon this point has been thus laid down, in conformity to the text of *Bracton*. "At common law, whoever takes and holds possession of land, to which another

has a better title, whether he be a *bonâ fide* or *malâ fide* possessor, is liable to the true owner for all the rents and profits which he has received. But the *disseisor*, (if he be a *bonâ fide* occupant,) *may recoupe the value of the meliorations made by him against the claim of damages.*" 8 *Wheat.* 75, 80, *Green vs. Biddle.* By the Civil Law, the exemption of the occupant from an account for rents and profits, is strictly confined to the case of a *bonâ fide* possessor, who not only *supposes* himself to be the true owner of the land, but who is ignorant that his title is contested by another person, claiming a better right. And such a possessor is entitled only to the fruits or profits which were *produced by his own industry*, and not even to those, unless they were consumed. *Id.* 79.]

Such was the law of damages in *real actions* after the statute of *Gloucester*; and such, without any material change, it continued until real actions went out of use in *England*. The circumstances by which that change was brought about, and an action of Trespass and Ejectment was converted into a remedy for the recovery of the freehold, has been explained in another place. *Ante*, p. 55, 56. It may be useful to the student to add a few remarks upon the introduction of *a subsequent action of Trespass*, for the recovery of the damages occasioned by the *disseisin*, usually denominated an action for the *mesne profits*. And it would not be uninteresting to notice the circumstances which have occasioned a *departure* from the ancient course of proceedings in real actions, by our own courts. We allude to the change by which the land only, *without damages for the ouster*, is now recovered in a writ of Entry; and a subsequent action *for the mesne profits* is brought, after the recovery in that action, in the same

manner, as after the recovery in an *Ejectment* in *England*.*

* The circumstances which led to the change of the ancient practice in writs of Entry, by rendering judgment for the land only, *without damages*, are perhaps too remote to be traced. It seems probable, indeed, considering the situation and character of the colonists, that this change was the result of accident, rather than design.

For sometime after the establishment of the colony, it will be recollected, all the powers of government were united in the same hands. The forms of judicial proceedings were imperfectly known, and but little regarded. The nature of legal remedies, and particularly the distinctions between different actions were by no means understood. And the ACTION ON THE CASE was for many years the *universal remedy*, not only for personal injuries, and breaches of contract, but even for the recovery of lands. See note A at the end of this volume.

Long before judicial proceedings had assumed a regular and systematic form in the *Massachusetts colony*, the *fictitious action of Ejectment* had become firmly established in the *English courts*. But the fictions adopted in that action were intelligible only to lawyers. And if they had been better understood, they were not of a nature to be approved and adopted by such a people as our ancestors. We should hardly expect them to resort to the indirect method of *making a lease* of their lands, in order to try the title. And as to the *confessing a lease*, an *entry*, and an *ouster*, which never had any existence in fact, they seem (as we should naturally expect,) to have regarded it as a *violation of truth*, and therefore wholly inadmissible.

It is doubtless to these circumstances that we are to attribute the remarkable fact, that there are only two cases to be found upon the records of our courts of the *fictitious action of Ejectment*, upon the *English* model. These were after a new organization of the courts under the administration of sir *Edmund Andros*, in the reign of James II. Both of them were brought by the same party, then resident in *England*; the one in *Suffolk* for lands in *Boston*, and the other in *Middlesex* for lands in *Malden*. In each case there was finally an appeal to the *king in council*. Whether the expectation of such an appeal was the reason for adopting the *English* practice cannot now be determined. See note A.

SECT. II. In order the better to understand [397] some of the remarks which are to follow, the student should bear in mind, that so refined were the notions concerning real property, even in the time of *Bracton*, that the *fee simple* was considered capable of being divided into several different interests. While one person had a freehold in a

It may be further remarked, that when precedents were consulted, the form of the *writs of Entry* would of course be considered more consonant to the nature of their titles, than the action of *Ejectment*. And we should expect to find the former remedy adopted in preference to the latter ; or that instead of an exact conformity to either, the features of both would be in some measure blended together. And we accordingly find, in the records of our courts, the precedents of writs for the recovery of lands, through nearly the whole of the last century, are of this mixed character. Even some of those which are in use at the present day, are *strictly* neither writs of Ejectment, Entry, Formedon, or writs of Right. Some of those which begin, "in a plea of ejectment," and demand the *possession*, and not the *seisin* or the *land*, afterwards proceed to allege a *seisin by taking the esples*, like a writ of Entry. See *Am. Prec.* 3d. ed. 358, No. 7 ; 362, No. 48.

When lawyers who were educated in *England* came to practice in the courts of the colony, they brought with them, and applied to the action in use here, the principles of the action of Ejectment, in which no damages were recovered. And it soon became the established law, that no damages were to be recovered with the land. So that, although we find a few *early cases*, in which lands were recovered, *with damages*, in the *action on the case* ; there probably will not be found any instance, within the last century and a half, in which damages have been recovered in a real action. It seems, indeed, to have been taken for granted, that the practice of the *English* courts, as to the recovery of *mesne profits*, by an action of trespass, after an Ejectment, was equally applicable to writs of Entry. But for the last thirty or forty years, its general application has been very correctly restricted to those cases of a recovery in a writ of Entry, where the demandant *had a right to enter*, when he commenced his suit.

tenement, another might have the *usufruct*, the *use*, and the *habitation*; as he has observed, in conformity to the distinctions of the *Roman law*. *Brac.* lib. iv. c. 36, § 1; and see *Inst.* lib. ii. tit. 4, 5. If he who was owner of the freehold, was ousted, his remedy (as we have seen in the former part of this work,) was by a writ of Entry, or some one of the real actions which have been mentioned. But for a long time there was no remedy, but upon his covenant, for him whose [399] estate was *less than a freehold*. At length, in the reign of Henry III. a remedy was provided for the recovery of the *usufruct*, the *use*, or the *habitation* of a tenement, if the owner was ejected before the end of the term. This remedy was the writ of *Quare ejecit infra terminum*, mentioned in a former chapter, (*Ante*, ch. 1, § 3,) by which the lessee recovered the residue of his term, with *damages* for the part of which he had been deprived. But this action was in a great measure superseded, early in the reign of Edward III. by the action of *Ejectione firmæ*, by which *damages only* were recovered by the lessee, against the wrongdoer, for the trespass committed in ejecting him.

The lessee had now three remedies, which were applicable to some of the injuries to which he was liable. 1. If his lessor ejected or disturbed him, he might have an action of covenant, to recover damages for the breach of his contract. [3 *Bl. Com.* 156, 157.] 2. If either the lessor, or a stranger ousted him, and made a feoffment to another, the lessee might have a *Quare ejecit infra terminum* against the *feoffee*; by which he would recover the residue of his term, with *damages* for being deprived of the possession. [3 *Bl. Com.* 207.] 3. He might maintain the *Ejectione firmæ*, for the recovery of *damages only* against the ejector. [3 *Bl. Com.* 199.]

But though a tenant for years might maintain [400] all these actions, they were so restricted in their application, that still he had no remedy by which he could obtain the restoration of his term, if a *stranger* ejected him, and instead of making a feoffment to another, *retained the possession himself*.

These circumstances led the court of Chancery to interpose, early in the reign of Henry VII. when the interests of lessees had become more important, on account of the long period for which leases were now frequently granted. The remedy there given was by a decree of *specific performance*, where the *lessor* was complained of, or an *injunction*, if the lessee was disturbed by a stranger. [3 *Bl. Com.* 200.] And about the same time the courts of law undertook, by an extraordinary proceeding, to do substantial justice, and *restore the term* to the lessee, when he was ousted. This was done by *changing the judgment* in the action of *Ejectione firmæ*, awarding a *recovery of the term*, with damages for the *disseisin* and *taking the profits* and issuing a *writ of Possession*.

This appears to be a great and sudden alteration of the law, considering that it was brought about by the mere authority of the court, without the sanction of the legislature. But the way had been gradually preparing for this new application of an old remedy, by the change of opinions which had taken place in the courts.

In the reign of Edward III. and afterwards in [401] that of Richard II. it had been expressly laid down by the court, that an *Ejectione firmæ* was merely an action of trespass, by which damages only could be recovered. *Fitzh. Ejectione firmæ*, 2; 3 *Bl. Com.* 200, *note (k.)* But early in the reign of Edward IV. we find it asserted in argument, and not denied by the

court that the plaintiff in *Ejectione firmæ* should recover what remained *unexpired* of his term, and *damages* for the time it had been withheld from him. 7 *Edw.* IV. 6, b. But though the change must have been made some years before, we do not find any judgment in this action for the recovery of the term, until the fourteenth year of Henry VII., the record of which may be seen in *Rastell.* 14 *H.* VII. 244, b ; *Rast.* 252, b. 253, a.

The practice thus established appears to have continued in *England*, until the action assumed its modern form. And the damages awarded by the jury, when the plaintiff recovered, were intended to be a compensation for the injury he had sustained, by being deprived of the possession and profits of the tenements, during the *tortious* holding by the defendant. But when the MODERN ACTION OF EJECTMENT, with its fictions, took place of the old remedy, the practice was changed. The jury were now restricted to trying the question of *title only*. The consequence was, that instead [402] of a just remuneration for the *loss of the possession*, the plaintiff now recovered only *nominal* damages. This rendered a new remedy necessary, after the possession had been restored, to obtain compensation for the injury sustained by the *ouster*, and the loss of the possession and profits. And the courts soon found means to give such a remedy, by an action of trespass for the *disseisin*, or as it is usually expressed, for the *mesne profits*. This action, which is *auxiliary* to the ejectment, is never brought, until after the *possession* has been recovered. In what cases it may be maintained, after a recovery in Ejectment, according to the modern practice of the *English courts*, will be next explained.

SECT. III. It is impossible, at this time, to ascertain with precision, when the action of *Trespass for the mesne profits* was first introduced. No allusion to such an action we believe occurs, until after the reign of Elizabeth. But there can be no doubt, that after the change in the action of Ejectment, by rendering judgment for the plaintiff to recover his term, he still continued to recover *damages* for the injury he had sustained, by being deprived of his property, until the remedy by a subsequent action of trespass for the *mesne profits* was introduced. 4 *Reeves' Hist.* 168, 169.

And this remedy was manifestly intended, as [403] *far as the nature of the action of Trespass would permit*, to be a complete substitute for the damages recovered in real actions, after the statute of *Gloucester*.*

After the recovery in the action of Ejectment, the lessor of the plaintiff, according to the present practice in the *English* courts, may bring the action of *Trespass for the mesne profits*, either in his own name, or in the name of the nominal lessee. The former method is most commonly adopted. And where the plaintiff intends to recover the rents and profits received by the defendant, anterior to the time of the demise stated in the Ejectment, he must of course sue in his own name; because damages cannot be awarded to the nominal

* It appears to have been the practice formerly in *Pennsylvania*, *Delaware*, and *Maryland*, to render judgment in the Ejectment for the *mesne profits*, and damages arising from the deprivation of the possession. 4 *Dal.* 142, *Boyd's lessee vs. Cowan*; 3 *Maryl. R.* 7, *M' Cubbin vs. Shield's lessee*. Whether the practice still prevails in *Delaware*, we are not informed. It has probably been long discontinued in *Maryland*; and in *Pennsylvania* a separate action is now brought for the recovery of the *mesne profits*. 3 *Maryl. R.* 96, *Gore's lessee vs. Worthington*; 6 *Bin.* 450, *Baily vs. Fairplay*.

plaintiff, for the rents received prior to the commencement of his supposed term. There is also another inducement for the lessor to sue for the profits in [404] his own name; that if the suit is instituted in the name of the nominal plaintiff, the proceedings will be staid, upon motion, until security is given for the costs.

It was once doubted whether this action could be maintained in the name of the *nominal plaintiff* in ejectment, after a judgment by default against the casual ejector; because, in order to maintain the action of Trespass, an *entry* must be either *proved* or *admitted*; and in this case neither could be done. But it was held by the court, that the *lessor of the plaintiff* and the *tenant in possession* were to be considered as the *real parties* to the suit; and that there was no distinction between a judgment in Ejectment by *verdict* and by *default*, as to the effect upon the action for the mesne profits; the right of the plaintiff in the one case being found by the jury, and in the other confessed. 2 Burr. 668, *Aslin vs. Parkin*.

If a *tenant in common* has recovered against his cotenant, in an action of Ejectment, he may afterwards maintain his action of Trespass for the *mesne profits* against him, (3 Wils 118, *Goodtitle vs. Tombs*,) notwithstanding the general rule of law, that one tenant in common cannot have trespass against another, for taking the whole profits. *Bro. Ten. in Com.* pl. 14. [405] But the action for *mesne profits* cannot be maintained against an executor or administrator, for the profits received by the *testator* or *intestate*, in his lifetime. For the remedy being by an action of *Trespass quare clausum fregit*, it dies with the party.

If the tenant underlets, the action for the *mesne profits* may be maintained against the under-tenant. For it is no defence to the action, that the party was upon the premises, as agent or under-tenant of the defendant in Ejectment; because no one can authorize another to enter upon land to which he has no title. But it does not appear to be settled in *England*, whether this action can be maintained against the defendant in the Ejectment, for the holding over of his sub-tenant. *Taunt. 720, Burne vs. Richardson.*

The right to recover the mesne profits is a necessary consequence of a recovery in an action of Ejectment, and the defendant can set up *no title* in bar. Even where the defendant, after a recovery in Ejectment against him, had commenced a *second* Ejectment for the same premises, and had obtained a verdict, he was not permitted to set up this second verdict, as a bar to an action for the mesne profits, which had been brought against him after the recovery in the first Ejectment. 2 *Johns. 360, Benson vs. Matsdorf.* And if the defendant, while an action of Ejectment is pend- [406] ing against him, gives up the possession to a third person, and the plaintiff afterwards recovers, an action for the mesne profits may be maintained against such third person; and the recovery will be conclusive against him, so that he *will not be permitted to set up a title in himself* in bar of the action. 13 *Johns. 447, Jackson vs. Stone.*

But the recovery in the action of Ejectment, and taking possession under it, is *conclusive* as to the right of the plaintiff to recover the mesne profits, *only from the day of the demise*, as laid in that action. If the plaintiff sues only for such profits as have accrued *since the demise*, no other evidence of his title is necessary, than

copies of the judgment in the Ejectment, of the writ of Possession, and the return of the officer, that he has executed the same. And if the plaintiff has been permitted by the defendant to go into possession, without executing a writ of Possession, a copy of the judgment, and evidence of possession under it, will be sufficient. 4 *Esp. Cas.* 167, *Calvert vs. Horsfall*. It does not seem, indeed, that evidence of a writ of possession executed is necessary in any case, except only where the judgment is by default against the casual ejector. But though not absolutely necessary, it is the most satisfactory, and generally the most convenient evidence.

[407] If there has been a recovery in ejectment against the wife, as a *feme sole*, the judgment will not be evidence against the husband and wife, in an action for the *mesne profits*. For the confession of the wife, that she has committed a trespass, cannot be given in evidence to charge the husband in an action in which he is liable for the damages and costs. 7 *T. R.* 108, *Denn vs. White et ux*.

When the judgment in an action of Ejectment is against the casual ejector for want of appearance, there being no other remedy for the recovery of the costs of the Ejectment, the court will permit the lessor of the plaintiff to have them included in the damages assessed for the *mesne profits*. And it seems, that even where the Ejectment has been defended, the plaintiff may have the *taxed costs* included in the damages for the mesne profits, if such costs have not been otherwise satisfied. 1 *Esp. Cas.* 358, *Doe vs. Davis*. But this mode of recovering the costs is seldom resorted to in practice.

Where the plaintiff, after a recovery in Ejectment, conveyed the premises to the defendant with special warranty, and then commenced an action for the mesne profits, the defendant contended that the plaintiff could not maintain the action, because the conveyance with warranty was a release in law, of the [408] mesne profits. But the court held that it was clearly otherwise; and awarded judgment for the plaintiff. 2 Dal. 156, *Duffield vs. Stille*.

The action for the *mesne profits* being merely an action of *Trespass Quare clausum fregit*, the pleadings are of course the same, as in other cases in which this action is brought. If the plaintiff demands the rents and profits for a longer period than six years, the defendant may plead the statute of limitations, and thereby protect himself against a recovery of damages, as to all beyond six years. *Bull. N. P.* 88. But as the action for mesne profits, (though sometimes denominated an equitable action,) is for a *tortious* occupation of the plaintiff's lands, the defendant cannot be permitted to pay money into court. 2 *Wils.* 115, *Holdfast vs. Morris*.

SECT. IV. We have just seen, (*Ante*, p. 359,) that according to the modern practice of the English courts, a recovery in Ejectment, and taking possession under the judgment, is *conclusive evidence* of the right of the plaintiff to maintain a subsequent action of Trespass for the *mesne profits*, from the date of the *demise*, as laid in the action of Ejectment. But the student is not to understand, that the same principle always holds, where the recovery is by *writ of Entry* or other *real action* according to the practice in *Massachusetts*. [409] For in *no case*, it seems, is a recovery in *any real action conclusive evidence* of the demandant's right

to the *mesne profits*. This distinction, which is often overlooked, should be borne in mind by the student. And the grounds of it will be better understood, if we consider for a moment the nature of the action of Trespass, and the requisites to enable the plaintiff to maintain it. It may also be useful to refer again to some of the points of difference between the remedy by Ejectment, and by a writ of Entry.

The action of Trespass *quare clausum fregit*, (the remedy for the recovery of the mesne profits,) is a *possessory action*. It is entirely founded upon an *injury to the plaintiff's possession*; and proof of an *actual or constructive possession* is indispensable, in order to maintain it. Where the party has never had possession, evidence of the *right of property*, though accompanied by the *right of possession*, will not enable him to maintain an action of Trespass *quare clausum fregit*. But where he has had the possession, he may maintain this action for the wrongful act by which he has been deprived of it; because, at the time that wrong was committed, he was in the possession. He is restricted, however, to the wrongful act, which constituted the *ouster*; and can maintain no action, or rather, [410] *can recover no damages*, for withholding the possession, or for any subsequent tortious act, unless he *first regains the possession*. But as soon as he has regained the possession, either by *re-entry* or by *an action*, the law, in order to afford him a complete remedy for the *whole injury* he has sustained, now supposes him, by a kind of *fiction*, or *just postliminii*, to have had possession *by relation*, from the commencement of the wrong. See 19 H. VI. 28; 11 Co. 51, *Liford's case*; 11 Mass. R. 519, *Starr vs. Jackson*; 9 Johns. 61, *Stuyvesant vs. Tompkins*; 12 Johns R. 183, *Wickham vs.*

Freeman. By the act of regaining the possession, the *ouster* is changed to a *trespass*. 9 *Mass. R.* 535, *Cox vs. Callender*. The consequence is, that the rightful owner may now have his action of trespass *with a continuando*, and recover damages *for the whole injury* he has sustained, however long it may have been continued; unless he is restricted to *six years* by the defendant's pleading the statute of limitations. *Bull. N. P.* 87; 2 *Johns. Cas.* 27, *Case vs. Shepherd*. But without proof of the *actual possession*, the most unquestionable title to the property, and the present right to the possession of it, will not enable the party to maintain this action.

If the estate has descended to the heir, he thereby acquires a seisin in law, and may make a lease or other conveyance, before he has entered upon [411] it. But until he has entered, he cannot maintain the action of trespass. *Plowd.* 142, *Browning vs. Betson*; *Gilb. Ten.* 45. If the heir enters upon an *abator*, he can have no action against him for the wrong done before. 2 *Rol.* 554; *Com. D. Tresp. B.* 3. And according to some authorities, a bargainee shall not have trespass before he makes an actual entry, though the possession is transferred to, and executed in him by the statute of uses. *Com. D. ib*; *Cart.* 66.

From these principles it will be manifest, that a recovery in a real action affords no conclusive evidence of the right of the demandant to maintain an action of Trespass for an injury to the same property; but sometimes the contrary. In several real actions there is no allegation of a seisin by the demandant, or even by his ancestor. And where a seisin and subsequent disseisin are alleged, there is no averment of such a possession by the demandant, as would enable him to maintain an

action for the mesne profits. In short, every fact set forth by the demandant, or found by the jury in a writ of Entry, where the demandant does not count upon his own seisin, may be true; and yet he may have no right to recover the mesne profits. The record therefore is only evidence of the demandant's right to the seisin, and not of the violation of his possession by the defendant.

[412] But when the party who has been *ousted*, instead of resorting to a writ of Entry or other real action, brings his action of Ejectment, and recovers the possession, the effect of such a recovery, as evidence of his right to maintain an action for the mesne profits, is totally different. The defendant in Ejectment is obliged in the outset, by entering into the rule to confess the *lease, entry and ouster*, to admit every fact necessary to enable the plaintiff to maintain the action of trespass, except the right to the possession, which is the only point in issue in that action. When that right is determined in favour of the plaintiff, by the verdict of the jury, the record of the recovery, with the possession under it, whether by entry in *pais*, or by executing a writ of possession, is conclusive evidence against the defendant upon the principles of *estoppel*. For it is a record between the *same parties*, relating to the *same right of possession*, in which the plaintiff asserts, and the defendant admits an actual possession by the former, and an ouster by the latter. The verdict of the jury establishes the plaintiff's right to the possession; and the court by the judgment gives its sanction to the whole transaction. This evidence, therefore, of the plaintiff's right to the mesne profits, must be considered uncontrollable and conclusive. 3 *East*, 346, *Outram vs. Morewood*.

And although a part of the record is founded [413] in *fiction*, (because the defendant often confesses an entry by the plaintiff, which was never in fact made,) it has nevertheless for this, and every other *equitable purpose*, the same effect as a real proceeding. No injustice is thereby done to the defendant. For the injury to the rightful owner is the same, whether he has the *actual possession*, or only a *right* to the possession and profits; whether the defendant stepped in before him, and prevented his entry, or came in after him, and thrust him out. In each case he is equitably entitled to a remuneration of his loss, in being deprived of the possession and profits by the defendant. And it was the design of the action of Trespass for the mesne profits to provide the owner a just indemnity, as far as the nature of the remedy would allow. But even the imperfect sketch which we have given, of the ancient law of *damages in real actions*, will be sufficient to show, that the action for the mesne profits, according to the present practice in England, falls far short of the ancient remedy in several cases. In our own practice, the law upon this subject is still unsettled in many important particulars. It seems however to be very obvious, that the remedy must be still more restricted *here*, if the principles of the action of trespass are to be strictly applied to it.

It was remarked generally, at the commence- [414] ment of this chapter, (*Ante*, p. 346.) that if the demandant had a *right of Entry*, he might, after the recovery of his seisin by a writ of Entry, maintain an action of trespass *for the disseisin*, or mesne profits. But it is proper to remind the student of the distinction between a writ of Entry *sur disseisin*, and those cases where the action is founded upon an *abatement*, *intru-*

sion, or *deforcement* and not upon a *disseisin*; and also between the case of a *disseisin* of the *demandant* and of his *ancestor*. For the remark referred to applies, in its fullest extent, to those cases only, where the *demandant* who recovered the judgment was the party *disseised*, and, in his writ of Entry, counted upon his own *seisin*. In such a case it is manifest, that the principle before referred to, of the recovery relating back to the time of the *disseisin*, so as to give him, in contemplation of law, *constructive possession*, during the time that the *actual possession* was withheld by the *disseisor*, applies in the same manner, as to the proceedings in actions of Ejectment.

When the recovery in a writ of Entry is by *the same party who was ousted*, and against him *who committed the ouster*, there is the same relation of the sub-[415] *sequent* to the *prior possession*, as in an action of Ejectment. But where the writ of Entry is founded upon an *abatement*, an *intrusion*, or a *deforcement*, the tenant, against whom the *demandant*, has recovered, can be considered a *trespasser*, and liable to an action for mesne profits, *only by resorting to a fiction*. For in all these cases the *demandant* is not even *supposed* to have had a *prior seisin or possession*, to which the subsequent recovery can relate. He has not therefore such a possession, *even by relation*, as is required to maintain an action of Trespass. And even where the action is founded upon a *disseisin*, the same remark applies, if it was a *disseisin* of the *ancestor* of the *demandant*, and not of the *demandant* himself. It is manifest, therefore, that the action for the mesne profits, which was intended as a *substitute* for the damages recovered in real actions, after the statute of *Gloucester*, is much restricted in its operation by the *nature of the remedy*.

We have in our practice no fiction to extend its operation by the *confession of an entry*. So that, in those cases where the demandant never had the *actual possession*, nor even acquired a momentary *seisin*, by making an actual entry, before he instituted the writ of Entry by which he recovered the *seisin*, we can, at most, only consider the recovery as having relation to the *commencement* of the suit, so as to entitle the demandant to the *mesne profits from that time*. So far, perhaps the courts may safely go. For it [416] does not seem to be a violation of any legal principle, to consider the deforcement, or wrongful withholding the possession from him who is entitled to it, after the commencement of his action, as *equivalent to a disseisin*. 2 *Pick. R.* 473, *Emerson vs. Thompson*. But where the demandant has *no right of entry*, (though he may have such a right of property as may entitle him to recover in a real action,) he has no claim to the mesne profits. 9 *Mass. R.* 533, *Cox vs. Callender*.

When the disseisor, instead of retaining the possession, transfers it to another by a conveyance in fee simple, a gift in tail, or a lease for life, the disseisee, as we have seen, may re-enter; or recover the *seisin* by a writ of Entry in the *PER*. But it has long been *vexata quæstio*, whether the disseisee, after regaining the possession, can maintain an action of trespass *against the alienee*,* who came in by title. The intro- [417]

* It may be useful, and perhaps interesting to the student, to see a brief sketch of the history of this celebrated question, which has divided the opinions of judges and lawyers for almost four centuries.

The first case in which it was fully discussed, is 19 *H. VI.* 27, 28, in which the judges were pretty equally divided. The same question was made again in 34 *H. VI.* 30, and it seems to have

duction of the fictitious action of Ejectment has put an end to this question in *England*, so far as relates [418] to the common action for the mesne profits.

been at the time admitted that trespass would in no case lie against a feoffee of the disseisor. The next notice we find of this question, is in 37 *H. VI.* 35. And it is there said by *Fortescue* and *Danby*, "if I am disseised, and the disseisor make a feoffment to one who cuts down trees, or takes the herbage, and I afterward re-enter, I may punish him by a writ of trespass; and so to *twenty alienees*." But *Littleton* and *Spilman* said they had always held the contrary; and that trespass lay against the disseisor only, and not against his feoffee. But the disseisee should recover against the disseisor *for the whole time*. And to this *Pole* assented. But *Fortescue* and *Danby* held *clearly* that the disseisee, after re-entry might have trespass, even against the twentieth alienee. For by the re-entry all the estates are defeated, as well the last as the first, and they shall be punished for the trespass, each one for his own time.

We find the same question discussed again in 13 *H. VII.* 15, 16, when *Keble* and *Wood* maintained the affirmative, and *Constable*, *Kingsmil*, *Frowicke*, and *others*, says the book, held the contrary; because by the common law, he who *comes in by title* shall not be punished. There are a few other cases in the year books, in which the point is alluded to by the judges without any opinion being expressed.

Brooke in his *Abr. Tresp.* pl. 35, says "*Nota per optimam opinionem*; If a man disseise me, and make a feoffment, and I re-enter, I shall not have trespass against the feoffee; for he is in by title, and not a trespasser to me." And he refers to the above case 34, *H. VI.* 30. And in *Liford's* case, 11 *Co.* 51, *lord Coke* adopts the same opinion that trespass does not lie in this case, against the feoffee, donee, or lessee, after the re-entry of the disseisee. And the chief ground of that opinion is, that the *fiction* of law, that the freehold *has always continued* in the disseisee, who has re-entered, shall not have relation to make him a trespasser, who came in by title; for *in fictione juris semper existit æquitas*. The same opinion had been held five years before *Liford's* case, in *Hobart*, 98, *Moore vs. Hussey*, and about fourteen years after, in *Hetley*, 66, *Symons vs. Symons*. It is also adopted in *Bac. Abr. Tresp. G.* §

Because the defendant in Ejectment admits in every case that he committed the ouster of which the plaintiff complains. But in our practice it is [419] otherwise. The demandant in a writ of Entry

2, and in 1 *Wood's Conv.* 108, where several other books are referred to, in which the opposite opinion is held.

Opposed to *Liford's case*, is *Holcomb vs. Rawlins*, decided seventeen years before, by *Popham* and *Fenner* against *Clench*; and reported in *Cro. Eliz.* 540, *Moore*, 461, and *Owen*, 111. And this decision is adopted by *Rolle*, in his *Abr.* 554, who notices *Liford's case*, and 13 *II. VII.* 15, as being to the contrary. It seems also to be considered the better opinion in *Com. D. Tresp. B.* 2; *Gilb. Ten.* 46, 47; and in *Vin. Tresp. T.* pl. 7.

Upon a review of the grounds on which these opposite opinions have been urged, it seems to be manifest, that those who have held the opinion stated by lord *Coke* in *Liford's case*, have proceeded upon the assumption, that when the disseisee regained the possession by a *re-entry*, instead of resorting to the remedy by *assize*, he might afterwards recover damages in an action of Trespass, only in the same cases, where he might have recovered damages in the *assize*, before the statute of *Gloucester*. And we have seen, *ante*, p. 346, that by the common law, the disseisor only was liable to damages in an *assize*, though the land might be recovered against his alienee.

Those who maintain the opposite opinion, appear to rest it upon the ground, that because the statute of *Gloucester* made the feoffee of the disseisor liable to damages in the *assize*; therefore, if instead of bringing his *assize*, the disseisee has regained the possession by an entry, he ought to have his action of trespass, to recover damages against the same person, of whom he could have recovered them by the *assize*, since that statute.

The doctrine in *Liford's case* has been adopted by the court of *New York*, in *Case vs. De Goes*, 3 *Caines*, 261. In *Massachusetts*, also, it is referred to as unquestionable authority, by *PARKER*, C. J. in 12 *Mass. R.* 46, *Fletcher vs. M'Farlane*. The contrary opinion has since been decidedly held by a majority of the court, as delivered by *WILDE*, J. after a pretty full examination of the question, in 2 *Pick. R.* 473, *Emerson vs. Thompson*. But see a very learned opinion of *PUTNAM* J. (who dissented from *PARKER*, C. J. and

in the *PER*, the *PER* and *CUI*, and even in the *POST*, does not charge the tenant, as the original author of the wrong, of which he complains. In the two first mentioned writs, he not only admits, but expressly avers in his count, that the tenant acquired the seisin by a *colourable title*. It follows, therefore, (unless some legal fiction is resorted to which may evade it,) that the liability of the tenant in these cases to the action for the *mesne profits*, involves the long disputed question above referred to. And we are not aware that it has received a direct decision in our courts.

From the principles which have been brought into view in the course of the preceding remarks, it is manifest that no *general rule* can be laid down in our practice, like that which is established in the *English* [420] courts, where he *who has recovered in Ejectment, may always maintain his action for the mesne profits*. There may, however, be drawn from those principles, several conclusions, which upon some points may satisfy, while on others, they will aid the enquiries of the student.

In the first place, it is admitted on all hands, that where the demandant, who has recovered his seisin, had *no right of entry* when he commenced his suit, he has *no claim* to the *mesne profits*. 9 *Mass. R.* 533, *Cox vs. Callender*. It seems indeed to be considered that where the demandant resorts to a writ of Right, or to a writ in the nature of a writ of Right, as a writ of For-

WILDE J.) 2 *Pick. R.* 491; and *Phillips' Digest of Pickering's Reports*, p. 259, *note*.

Among so many distinguished names, the opinion of a *humble and private individual* can give no additional weight to either side of the question. But in our view, the opinion of lord *Coke* is best supported by *principle and authority*.

medon, that he thereby admits the tenant's right of possession, and cannot afterwards recover the mesne profits. For in these actions it has been held ~~that~~ the right is established by the recovery, only from the rendition of the judgment. 12 *Mass. R.* 46, *Fletcher vs. McFarlane*. And where a mortgagee, after obtaining judgment and possession, in order to foreclose the mortgage, brought an action of Trespass to recover the mesne profits from the commencement of the former suit, it was decided that the action could not be maintained. 1 *Pick* 87, *Wilder vs. Houghton*. It has also been held, that where the jury had ascertained the value of the land, and of the improvements made by the tenant, pursuant to the statute of 1807, ch. [421] 75, the demandant could not recover the mesne profits, whether he elected to pay for the improvements, or to abandon the land to the tenant. 12 *Mass. R.* 314, *Jones vs. Carter: Ante* ch. IV. § 21, 23. In *New Hampshire*, a contrary decision has been made under a statute containing *similar*, but not precisely the same provisions. 2 *N. H. Rep.* 115, *Withington vs. Corey*.

By the law of *Massachusetts*, it seems that the tenant, against whom there has been a recovery in a real action, is liable for the rents and profits *during the whole time he has held the possession*, only in one case. And that is when the same party, whom he has disseised, has recovered against him by writ of Entry in the *QUIBUS*. But we have seen in a former chapter, (*Ante* p. 76,) that where a man has never been actually seised, but is entitled *to enter*, as heir, devisee, remainder-man, or reversioner, if he enters, he thereby becomes seised; and the opposing his entry, or resisting his taking possession, is regarded by the law as an *ouster*. He may thereupon maintain his writ of Entry in the *QUIBUS*,

upon his own seisin. And when he has recovered in that action, he will of course be entitled *to recover the mesne profits* also against the tenant, from the time of his entry. For any resistance to the entry of [422] him who has right, or withholding the possession from him, for all the purposes of recovering the seisin and the *mesne profits*, has the same effect as an *actual disseisin*.

But where the demandant in a writ of Entry in the *QUIBUS* counts upon the seisin of his ancestor, and where he brings his writ of Entry *sur disseisin*, or *sur intrusion*, in any of the degrees, the tenant can, upon no legal principle be considered as a trespasser, even by relation, before the commencement of the demandant's suit. It is therefore from that time only, at the farthest, that he can claim to recover the mesne profits. In some cases of *deforcement*, and *intrusion*, and perhaps of *disseisin*, it would be difficult to maintain the demandant's right to the rents and profits, even from the commencement of his writ of Entry, upon any sound principles of law, applicable to the action of Trespass. *Emerson vs. Thompson*, 2 Pick. 473. These considerations, the student will perceive, furnish strong reasons for making an entry, as early as may be convenient, where the party has never had the *actual seisin*; especially when the value of the rents and profits is a subject of importance.

SECT. V. It only remains to add a few words upon the subject of *damages*, in the action for the recovery of the mesne profits. And it is proper [423] here to remind the student, that although this action is denominated an action *for the mesne profits*, it is an action of Trespass *vi et armis*; and the jury

are not confined, in giving their verdict, to the mere *rent* or *income* of the premises. They may give such *extra damages*, as they may think the peculiar circumstances of the case require. In *Goodtitle vs. Tombs*, (3 Wils. 118.) Mr. Justice *Gould* mentioned that he had known four times the value of the mesne profits given by the jury in this action; and added, that "if it was not sometimes to be so, complete justice could not be done to the party injured." This is especially the case, where the *ouster* of the rightful owner has been attended with circumstances of aggravation, or the premises have been particularly injured by the misconduct of the defendant. But in order to entitle the plaintiff to give evidence of such special damage, and to have it awarded to him by the verdict of the jury, all such facts and circumstances must be specially alleged in the declaration. *App. No.* 101; and see *Adams on Eject.* 337; 2 *Chit. Pl.* 435, note f.

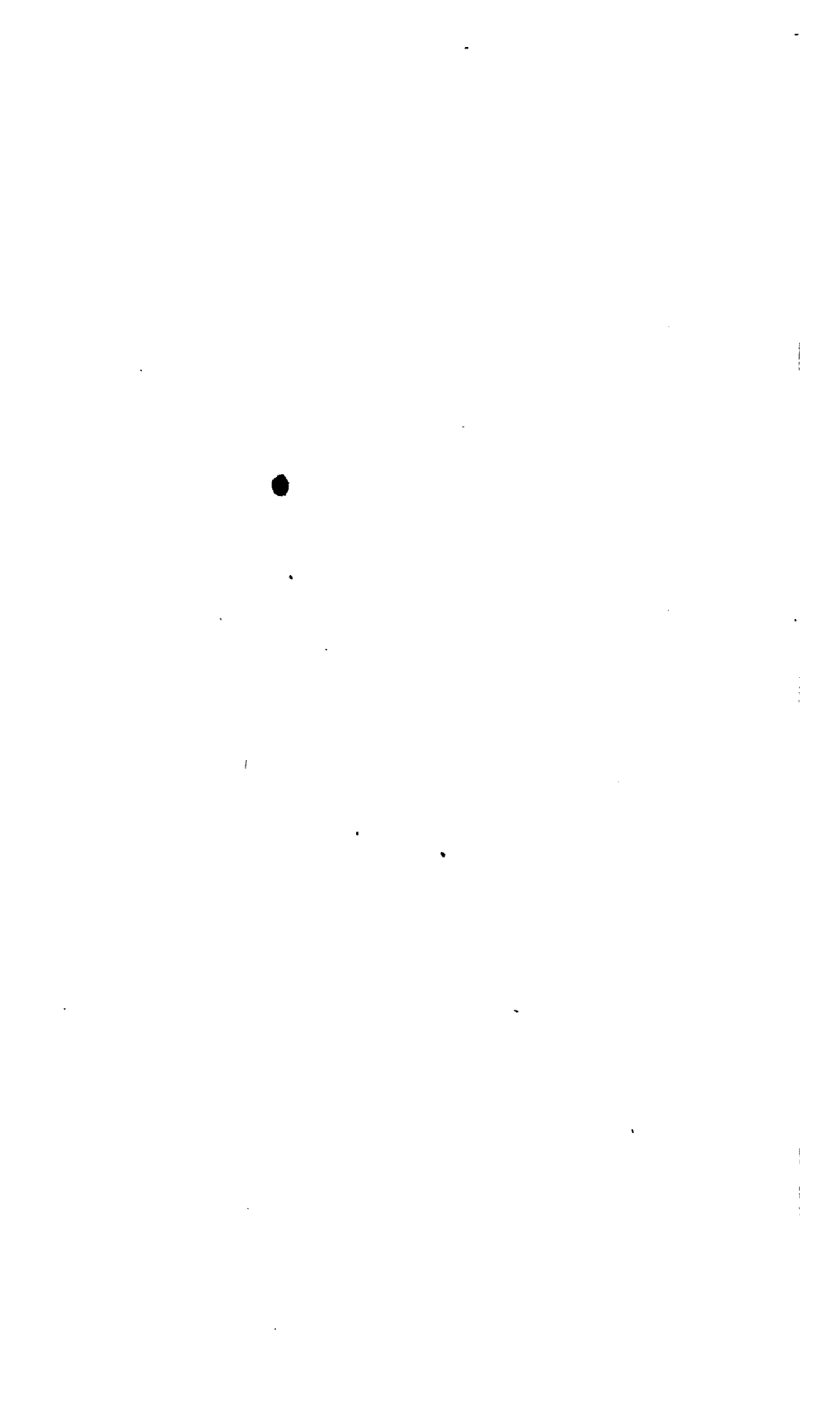
We have seen, (*Ante*, p. 349, 350,) that in the time of *Bracton*, he who recovered in an *Assize of novel disseisin*, was entitled to receive in damages, not only a compensation for the profit he might have made [424] from the property, if he had remained in possession, and for the inconvenience he had suffered by being deprived of the enjoyment of it; but an indemnity also for what had been injured or destroyed, during the continuance of the *ouster*, even by accident. And this seems highly reasonable. For it never can be rendered certain, that the accident would have happened, if the *ouster* had not been committed. Perhaps the rule has not been laid down quite so broadly, in any of the cases of trespass for the mesne profits. But it is held in a late case that the disseisor is answerable over to the

disseisee for any injury done to the freehold by a stranger, while he continues to hold the possession against the disseisee. 15 *Mass. R.* 137, *Cutts vs. Spring*. And it is chiefly upon this ground, that a disseisor is permitted to maintain an action of Trespass against such a stranger, for an injury done to that possession, which he holds himself by wrong.

On the other hand, this is considered a *liberal and equitable action*, in which the defendant is entitled to every kind of equitable allowance, especially where he came into the possession under a supposed legal title. 2 *Johns. Cas.* 441, 442, *Murray vs. Gouverneur*. He will therefore be allowed to set off against the rents, the taxes he may have paid, and the expences incurred in making *necessary* and judicious repairs. [425]

[But where the tenant made improvements on the land, *after* an action had been commenced against him to recover it, and in which judgment was afterwards given against him; it was *held* (in a subsequent action of trespass for the *mesne profits*,) that he was not entitled to any deduction for those improvements. 2 *Pick. R.* 505, *Russell vs. Blake*.] Whether he shall be allowed, for substantial and permanent improvements, not strictly of the nature of repairs, made *before* he had any intimation of the defect of his title; as for erecting buildings, fences, and the like, where there were none before, has not perhaps been decided. It was the opinion of *Bracton*, (*Ante*, p. 350; *Brac. lib.* 4, ch. 19, § 8,) that the value of such improvements was to be allowed by the ancient law, by way of reducing the damages, to be recovered in the action of Assize. And it seems highly reasonable to adopt the same principle in our law, where the party cannot avail himself of the provisions of the

statute of 1807, ch. 75, because the adverse seisin has not been continued six years. For in this way only can the fair and honest purchaser obtain, in many instances, that equitable allowance, to which he is as well, and often much better entitled, than most of those persons, for whose benefit that statute was intended.



APPENDIX

OF

PRECEDENTS IN REAL ACTIONS.

No. 1.

Entry in the QUIBUS upon the seisin of the Demandant who claims a fee simple.

SUMMON A. to answer unto B. in a plea of Land, wherein the said B. demands against the said A. one hundred acres of land, with the appurtenances, (*or one messuage with appurtenances,*) in C. aforesaid, bounded, &c. whereof the said A. unjustly and without judgment disseised him the said B. within thirty years now last past. WHEREUPON the said B. says that he was seised of the demanded premises, with the appurtenances, in his demesne *as of fee and right*, within thirty years now last past, by taking the profits thereof, to the value of ten dollars by the year; and the said A. disseised him thereof, and still unjustly withholds the same. To the damage, &c.

No. 2.

Entry in the QUIBUS upon the seisin of the Demandant who claims an estate for life.

SUMMON A. to answer unto B. in a plea of Land, wherein he demands against the said A. forty acres of meadow, with the appurtenances, in C. aforesaid, bounded, &c. whereof the said A. unjustly and without judgment disseised him, the said B. within

thirty years now last past. WHEREUPON the said B. says that he was seised of the demanded premises, with the appurtenances, in his demesne *as of freehold*,* within thirty years now last past, by taking the profits thereof, to the value of ten dollars by the year; and the said A. disseised him thereof, and still unjustly withholds the same.

No. 3.

Entry in the QUIBUS upon the seisin of Husband and Wife, who demand the fee simple.

SUMMON A. to answer unto B. and M. his wife, in right of the said M., in a plea of Land, wherein they demand against the said A. one hundred acres of land, with the appurtenances, in C. aforesaid, bounded, &c. whereof the said A. unjustly and without judgment disseised them, the said B. and M., within thirty years now last past. WHEREUPON the said B. and M. say that they were seised of the demanded premises, with the appurtenances, in their demesne *as of fee*, in right of the said M.† within thirty years now last past, by taking the profits thereof to the value of ten dollars by the year; and the said A. thereof disseised them, and still unjustly withholds the same.

No. 4.

Entry in the QUIBUS by Husband and Wife, who demand the Freehold upon the seisin of the Wife, while sole.

SUMMON A. and R. to answer unto B. and M. his wife, in right of the said M., in a plea of Land, wherein they demand against the said A. and R. one hundred acres of land, with the

* This is the proper form, where the demandant claims an estate for life; as tenant by the curtesy, in dower, or as lessee for life.

† It must be stated that they were *both* seised in right of the wife. 1 Saund. 253, n. 4; Doug. 329.

appurtenances, in C. aforesaid, bounded, &c. whereof the said A. and R. unjustly and without judgment disseised the said M. while she was sole and unmarried, within thirty years now last past. WHEREUPON the said B. and M. say that she the said M. was seised of the demanded premises with the appurtenances, in her demesne *as of freehold*,* while she was sole and unmarried, within thirty years now last past, by taking the profits thereof to the value of ten dollars by the year; and the said A. and R. thereof disseised her: after which she intermarried with the said B. her husband. And the said A. and R. still unjustly withhold the same.

No. 5.

Entry in the QUIBUS, by the Heir upon the seisin of his Father.

SUMMON A. to answer unto B. in a plea of Land, wherein he demands against the said A. one messuage, &c. with the appurtenances, in C. aforesaid, *which he claims to be his right and inheritance*,† and whereof the said A. unjustly and without judgment disseised one J. S. father of the said B., whose heir he is, within thirty years now last past. WHEREUPON he says that the said J. S. father of him the said B., whose heir he is, was seised of the messuage aforesaid, with the appurtenances, in his demesne *as of fee and right*, within thirty years now last past, by taking the profits thereof, to the value of ten dollars by the year; and the said A. thereof disseised him. And from the said J. S. the right descended to the said B. who now demands the same, as son and heir of the said J. S.;‡ and the said A. still unjustly withholds the same.

* This is the proper form, where tenants in Dower, as well as other tenants for life, have been disseised.

† These words should always be inserted, when the demandant claims as heir. *Ante*, p. 134.

‡ The demandant must always show *how* he is heir, when he counts upon the seisin of his ancestor. *Ante*, p. 138.

No. 6.

Entry in the QUIBUS by two Children, (one being a Feme Covert,) and two Grandchildren, upon the seisin of their Ancestor.*

SUMMON A. to answer unto B. and M. his wife, in right of the said M., and to D. E. and F. in a plea of Land, wherein they demand against the said A. fifty acres of salt marsh, with the appurtenances, in C. aforesaid, bounded, &c. *which they claim to be their right and inheritance*, and whereof the said A. unjustly and without judgment disseised one J. S. father of the said M. and D. and grandfather of the said E. and F. whose heirs they are, within thirty years now last past. WHEREUPON they say, that the said J. S., father of them the said M. and D., and grandfather of the said E. and F., whose heirs they are, was seised of the said fifty acres of salt marsh, *(or of the demanded premises,)* with the appurtenances, in his demesne *as of fee and right*, within thirty years now last past, by taking the profits thereof to the value of twenty dollars by the year; and the said A. thereof disseised him. And from the said J. S. the *right* descended to the said B. and M. in right of the said M. and to the said D., the children of the said J. S., and to the said E. and F., the grandchildren of the said J. S., and children of one T. S. son of the said J. S.† who now demand the same as heirs of the said J. S.; that is to say, one third part thereof‡ to the said B. and M. in right of the said M., and one third part thereof to the said D. one half of one third part thereof to the said E. and one half of one third part thereof to the said F.: and the said A. still unjustly withholds the same.

* By *Mass. Stat.* 1785, ch. 62, § 3, heirs may sue for their inheritance separately or together. *Ante*, p. 93.

† When the demandant claims as heir, he must always show how he is heir. *Ante*, p. 138.

‡ It is not necessary to state the respective shares, though it is generally done.

No. 7.

Entry in the QUIBUS by the Mother, Brother, and Nephews of the Disseisee: the Nephews being Infants, and suing by their Prochein ami.

SUMMON A. to answer unto B. widow, D. yeoman, and E. and F. minors, under the age of twenty-one years, who sue in this behalf by the said D. their uncle and next friend, in a plea of Land, wherein they demand against the said A. one hundred acres of land, with the appurtenances, in C. aforesaid, bounded, &c. *which they claim to be their right and inheritance*, and whereof the said A. unjustly and without judgment disseised one J. S. the son of the said B., the brother of the said D., and the uncle of the said E. and F. whose heirs* they are, within thirty years now last past. WHEREUPON they say, that the said J. S. son of the said B., brother of the said D., and uncle of the said E. and F., whose heirs they are, was seised of the demanded premises, with the appurtenances, in his demesne *as of fee and right*, within thirty years now last past, by taking the profits thereof to the value of ten dollars by the year; and the said A., thereof disseised him. And from the said J. S. the *right* descended to them, the said B. the mother of the said J. S., to the said D., the brother of the said J. S., and to the said E. and F., the sons of one T. S., brother of the said J. S., who now demand the same as heirs of the said J. S.; and the said A. still unjustly withholds the same.

* See *Mass. Stat. of Descents*, 1805, ch. 90. The heirs may sue for their inheritance separately or together. *Mass. Stat.* 1785, ch. 62, § 3. There is always *some hazard* in joining several demandants in a real action, because the death of one may abate the writ, if pleaded, or if suggested upon the record by *one of the demandants*. 11 *Mass. R.* 56, *Cutts & al. vs. Haskins*. So also if one demandant, being a *feme sole*, marries pending the suit, it may be pleaded in abatement. 10 *Mass. R.* 179, *Oznard vs. Prop. of Kennebeck Purchase*. [But the law on this subject has been altered, since the former edition of this work was published, by *stat.* 1826, ch. 70, and *stat.* 1828, ch. 140. See *ante*, Ch. IV. § 18.]

No. 8.

*Entry in the QUIBUS by the Heir on the seisin of her Mother,
Tenant pur auter vie.*

SUMMON A. to answer unto B. in a plea of Land, wherein she demands against the said A. twenty acres of land, with the appurtenances, in C. aforesaid, bounded, &c. which she claims to be her right and inheritance, and whereof the said A. unjustly and without judgment disseised one M. S. mother of the said B. whose heir she is, within thirty years now last past. WHEREUPON she says that the said M. S., mother of her the said B., whose heir she is, was seised of the demanded premises, with the appurtenances, in her demesne *as of freehold*, (for the term of the life of one W. T.* who is yet living,) within thirty years now last past, by taking the profits thereof to the value of ten dollars by the year; and the said A. thereof disseised her; and from the said M. S. the *right* descended to the said B. who now demands the same, as daughter and heir of the said M. S. And the said A. still unjustly withholds the same,

No. 9.

Entry in the QUIBUS by a Minister, upon the seisin of his Predecessor.

SUMMON A. to answer unto B., minister of the town (precinct or parish) of H., in a plea of Land, wherein he demands against the said A. one messuage with the appurtenances, in H. aforesaid, bounded, &c. which he claims to be *the right of the said town, (precinct or parish,)* of H., and whereof the said A. unjustly and without judgment disseised one J. S., late minister of the said town (precinct or parish) of H., whose *successor* the said B. is, within thirty years now last past. WHEREUPON he

* By *Mass. Stat.* 1805, ch. 90, § 1, estates *pur auter vie* are estates of inheritance.

says that the said J. S., late minister of the said town (precinct or parish) of H., whose *successor* he is, was seised of the said messuage, with the appurtenances, in his demesne as of fee, *in right of the town (precinct or parish) aforesaid*, within thirty years now last past, by taking the profits thereof to the value of twenty dollars by the year; and the said A. thereof disseised him. And from the said J. S. *the right came* to him the said B. who now demands the same, as successor of the said J. S., *in right of the town (precinct or parish) aforesaid*. And the said A. still unjustly withholds the same.*

No. 10.

Entry sur disseisin in the PER, upon the Demandant's own seisin in Fee.

SUMMON A. to answer unto B. in a plea of Land, wherein the said B. demands against the said A. sixty acres of wood land, with the appurtenances, in C. aforesaid, bounded, &c. and into which the said A. hath no entry, but *by* one J. N. who demised the same to him, and thereof unjustly and without judgment disseised him the said B. within thirty years now last past. WHEREUPON he says that he the said B. was seised of the demanded premises, with the appurtenances, in his demesne as of fee and right, within thirty years now last past, by taking the profits thereof, to the value of twenty dollars by the year; and the said J. N. unjustly thereof disseised him, and demised the same to the said A. who still unjustly withholds the same.

No. 11.

Entry sur disseisin in the PER, by Tenant for Life, upon his own seisin.

SUMMON A. to answer unto B. in a plea of Land, wherein he demands against the said A. twenty acres of land, with the ap-

* See 2 Mass. R. 500, *Weston vs. Hunt*; 5 Mass. R. 555, *Dillingham vs. Snow*; 7 Mass. R. 445, *Parish of Brunswick vs. Dunning*; 10 Mass. R. 93, *Brown vs. Porter*.

partenances, in C. aforesaid, bounded, &c. and into which the said A. hath no entry, but by one J. N. who demised the same to him, and thereof unjustly and without judgment disseised the said B. within thirty years now last past. WHEREUPON he says that he, the said B. was seised of the demanded premises, with the appurtenances, in his demesne *as of freehold*, within thirty years now last past, by taking the profits thereof, to the value of ten dollars by the year; and the said J. N. unjustly thereof disseised him, and demised the same to the said A., who still unjustly withholds the same.

No. 12.

Entry sur disseisin in the PER by a Corporation.

SUMMON A. to answer to the President and Fellows of Harvard College, in a plea of Land wherein the said President and Fellows demand against the said A. forty acres of land, with the appurtenances, in C. aforesaid, bounded, &c. and into which the said A. hath no entry, but by one J. N. who demised the same to him, and thereof unjustly and without judgment disseised the said President and Fellows, within thirty years now last past. WHEREUPON the said President and Fellows say, that they were seised of the demanded premises, with the appurtenances, in their demesne *as of fee and right*, within thirty years now last past, by taking the profits thereof, to the value of ten dollars by the year; and the said J. N. unjustly thereof disseised them, and demised the same to the said A., who still unjustly withholds the same.

No. 13.

Entry sur disseisin in the PER, upon the seisin of the Brother, to whom the Demandant is Heir, and claims a Moiety.

SUMMON A. to answer unto B. in a plea of Land, wherein he demands against the said A. one undivided moiety of sixty acres of land, with the appurtenances, in C. aforesaid, bounded, &c.

which he claims to be *his right and inheritance*, and into which the said A. hath no entry, but *by* one J. N. who demised the same to him, and thereof unjustly and without judgment disseised one J. S., brother of the said B., whose heir he is, within thirty years now last past. WHEREUPON the said B. says, that the said J. S. brother of him the said B. whose heir he is, was seised of the demanded premises, with the appurtenances, in his demesne as of fee and right, within thirty years now last past, by taking the profits thereof to the value of ten dollars by the year; and the said J. N. unjustly thereof disseised him, and demised the same to the said A; and from the said J. S. (who died without issue,) the right descended to him the said B. as brother and heir of the said J. S.; and the said A. still unjustly withholds the same.

No. 14.

Entry sur disseisin in the FEB, upon the seisin of the Demandant's Father, who was Tenant pur auter vie.

SUMMON A. to answer unto B. in a plea of Land, wherein he demands against the said A. twenty acres of land, with the appurtenances, in C. aforesaid, which he claims to be his right and inheritance, and into which the said A. hath no entry, but *by* one J. N. who demised the same to him the said A., and thereof unjustly and without judgment disseised one J. S., father of the said B., whose heir he is, within thirty years now last past. WHEREUPON he says, that the said J. S., father of him the said B., whose heir he is, was seised of the demanded premises with the appurtenances, in his demesne as of freehold, (for the term of the life of one W. T.* who is yet living,) within thirty years now last past, by taking the profits thereof to the value of ten dollars by the year; and the said J. N. unjustly thereof disseised the said J. S., and demised the same to the said A. And from the said J. S., the right descended to the said B., who now de-

* By *Mass. Stat. 1865*, ch. 90, § 1, estates *pur auter vie* are estates of inheritance.

mands the same, as son and heir of the said J. S.; and the said A. still unjustly withholds the same.

No. 15.

Entry sur disseisin in the PER, by a Rector upon his own seisin, in Right of his Church.

SUMMON A. to answer unto B., Rector of Saint Peter's church in R., in a plea of Land, wherein he demands against the said A. one messuage with the appurtenances, in R. aforesaid, bounded, &c. which he claims to be *the right of the said church*, and into which the said A. hath no entry, but by one J. N. who demised the same to him, and thereof unjustly and without judgment disseised him the said B., within thirty years now last past. WHEREUPON he says, that he, the said B., was seised of the demanded premises, with the appurtenances, *in his demesne as of fee, in right of the church* aforesaid*, within thirty years now last past, by taking the profits thereof to the value of fifty dollars by the year; and the said J. N. unjustly thereof disseised him, and demised the same to the said A., who still unjustly withholds the same.

No. 16.

Entry sur disseisin in the PER and CUI, on the Demandant's own seisin for Life.

SUMMON A. to answer unto B. in a plea of Land, wherein the said B. demands against the said A. one hundred acres of land, with the appurtenances, in C. aforesaid, bounded, &c. and into which the said A. hath no entry, but by one F., to whom J. N. demised the same, who thereof unjustly and without judgment disseised the said B. within thirty years now last past. WHERE-

* The seisin of a Rector must be stated to be *in fee, in right of his church*. 2 Mass. R. 502, *Weston vs. Hunt*.

UPON he says, that he the said B. was seised of the demanded premises, with the appurtenances, in his demesne *as of freehold*, within thirty years now last past, by taking the profits thereof to the value of ten dollars by the year; and the said J. N. unjustly thereof disseised him, and demised the same to the said F., by whom the said A. entered, and still unjustly withholds the same.

No. 17.

Entry sur disseisin in the PER and CUI, upon the seisin of the Son of the Demandant, whose Heir he is.

SUMMON A. to answer unto B. in a plea of Land, wherein he demands against the said A. fifty acres of land, with the appurtenances, in C. aforesaid, bounded, &c. which he claims to be *his right of inheritance*, and into which the said A. hath no entry but by one F. to whom J. N. demised the same, who thereof unjustly and without judgment disseised J. S. son of the said B. whose heir he is, within thirty years now last past. WHEREUPON he says, that the said J. S., son of him the said B., *whose heir he is*, was seised of the demanded premises, with the appurtenances, in his demesne *as of fee and right*, within thirty years now last past, by taking the profits thereof, to the value of ten dollars by the year; and the said J. N. thereof unjustly disseised him, and demised the same to the said F., by whom the said A. entered. And from the said J. S., who died without issue, *the right* descended to the said B., who now demands the same, as father and heir of the said J. S. And the said A. still unjustly withholds the same.

No. 18.

Entry sur disseisin in the PER and CUI, by Husband, Tenant by the Curtesy, upon the seisin of himself and Wife.

SUMMON A. to answer unto B. in a plea of Land, wherein he demands against the said A. two hundred acres of land, with the

appurtenances, in C. aforesaid, bounded, &c. which he claims to be his right, and into which the said A. hath no entry but *by one F. to whom J. N. demised the same, who thereof unjustly and without judgment disseised the said B. and the said M. deceased, late wife of the said B., within thirty years now last past. WHEREUPON* he says, that he the said B. and the said M., his wife, were seised of the demanded premises with the appurtenances in their demesne *as of fee in the right of the said M.* within thirty years now last past, by taking the profits thereof to the value of fifty dollars by the year; and the said J. N. unjustly thereof disseised them, and demised the same to the said F., by whom the said A. entered. And from the said M., the late wife of the said B., (*by whom he had issue in her lifetime, to wit. D. and E., children of them the said B. and M.,*) *the right came to the said B., who now demands the same as tenant by the curtesy; and the said A. still unjustly withholds the same.*

No. 19.

Entry sur disseisin in the PER and CUI, by a Minister upon his own seisin.

SUMMON A. to answer unto B., minister of the First Parish in the town of H., in a plea of Land, wherein he demands against the said A. one hundred acres of land, with the appurtenances, in H. aforesaid, bounded, &c. which he claims to be *the right of the said Parish*, and into which the said A. hath no entry, but *by one R. to whom J. N. demised the same, who thereof unjustly and without judgment disseised the said B. within thirty years now last past. WHEREUPON* he says, that he the said B. was seised of the demanded premises, with the appurtenances, in his demesne *as of fee, in right of the Parish* aforesaid*, within thirty years now last past, by taking the profits thereof to the

* The seisin of a minister must be stated to be *in fee, in right of his Parish, Town, Precinct, or Church.* 2 Mass. R. 569, *Weston vs. Hunt.*

value of twenty dollars by the year ; and the said J. N. thereof unjustly disseised him, and demised the same to the said R., by whom the said A. entered and still unjustly withholds the same.

No. 20.

Entry sur disseisin in the POST, upon the seisin of the Demandant in Fee.

SUMMON A. to answer unto B. in a plea of Land, wherein he demands against the said A. one messuage, with the appurtenances, in C. aforesaid, bounded, &c. and into which the said A. hath no entry but *after* the disseisin which one J. N. thereof unjustly and without judgment did to the said B., within thirty years now last past. WHEREUPON he says, that he the said B. was seised of the demanded premises, with the appurtenances, in his demesne *as of fee and right*, within thirty years now last past, by taking the profits thereof to the value of ten dollars by the year ; and the said J. N. thereof disseised him. And afterwards the said A. thereinto entered, and deforced the said B. thereof, and still unjustly withholds the same.

No. 21.

Entry sur disseisin in the POST, by Husband and Wife, upon the seisin of the Wife's Mother.

SUMMON A. to answer unto B. and M. his wife, in a plea of Land, wherein they demand against the said A. one hundred acres of land, with the appurtenances, in C. aforesaid, bounded, &c. which they claim to be the right and inheritance of the said M., and into which the said A. hath no entry but *after* the disseisin which one J. N. thereof unjustly and without judgment did to M. S., mother of the said M., whose heir she is, within thirty years now last past. WHEREUPON they say, that the said M. S., mother of the said M., whose heir she is, was seised of the demanded premises, with the appurtenances, in her demesne

as of fee and right, within thirty years now last past, by taking the profits thereof to the value of twenty dollars by the year; and the said J. N. thereof disseised her. And from the said M. S. *the right* descended to the said B. and M., who now demand the same *in right of the said M.*, as daughter and heir of the said M. S. And afterwards the said A. thereinto entered, and deforced the said B. and M. thereof, and still unjustly with holds the same.

No. 22.

Entry sur disseisin in the post, by two Children and two Grandchildren, upon the seisin of their Ancestor.

SUMMON A. to answer unto B., C., D. and E. in a plea of Land, wherein they demand against the said A. one hundred acres of land, with the appurtenances, in C. aforesaid, bounded, &c. which they claim to be their right and inheritance, and into which the said A. hath no entry, but *after* the disseisin which one J. N. thereof unjustly and without judgment did to J. S., father of the said B. and C., and grandfather of the said D. and E., whose heirs they are, within thirty years now last past. WHEREUPON they say, that the said J. S., father of them the said B. and C., and grandfather of the said D. and E., *whose heirs they are*, was seised of the demanded premises with the appurtenances in his demesne *as of fee and right*, within thirty years now last past, by taking the profits thereof to the value of twenty dollars by the year; and the said J. N. thereof disseised him. And from the said J. S. *the right* descended to them the said B. and C., the daughters and heirs of the said J. S., and to the said D. and E., the grandsons and heirs of the said J. S., to wit. sons of one M., daughter of the said J. S., whom he survived: that is to say, one third part thereof * to the said B., one third part thereof to the said C., one half of one third part thereof to the

* Though usual, it is not necessary to state the shares of the demandants.

said D., and one half of one third part thereof to the said E. And afterwards the said A. thereinto entered, and deforced the said B., C., D. and E. thereof, and still unjustly withholds the same.

No. 23.

Entry sur disseisin in the POST, against a Corporation, upon the seisin of Demandant's Brother.

SUMMON the President* and Trustees of H. Academy, to answer unto B. in a plea of Land, wherein he demands against the said President and Trustees, three undivided seventh parts of fifty acres of land, with the appurtenances, in C. aforesaid, bounded, &c. which he claims to be his right and inheritance, and into which the said President and Trustees have no entry but *after* the disseisin which one J. N. thereof unjustly and without judgment did to one J. S., brother of the said B., *whose heir he is*, within thirty years now last past. WHEREUPON he says, that J. S. brother of him the said B. whose heir he is, was seised of the demanded premises, with the appurtenances, in his demesne *as of fee and right*, within thirty years now last past, by taking the profits thereof to the value of five dollars by the year; and the said J. N. thereof disseised him. And from the said J. S. *the right* descended to the said B., who now demands the same, as brother and heir of the said J. S. And afterwards the said President and Trustees thereinto entered, and deforced the said B. thereof, and still unjustly withhold the same.

* Care should be taken to state the name of incorporation correctly, to avoid a plea in abatement. 5 *Mass. R.* 97, *Gilbert & al. vs. Nantucket Bank.*

No. 24.

Entry in the POST by Proprietors of Lands, Wharves, &c. held in common.*

SUMMON A. to answer unto the Proprietors† of, &c. in a plea of Land, wherein they demand against the said A. fifty acres of land, with the appurtenances, in C. in the county aforesaid, bounded, &c. and into which the said A. hath no entry but *after* the disseisin, which one J. N. unjustly and without judgment thereof did to the said Proprietors, within thirty years now last past. WHEREUPON the said Proprietors say, that they were seised *in their corporate capacity*, of the demanded premises, with the appurtenances, *in their demesne as of fee and right*, within thirty years now last past, by taking the profits thereof to the value of twenty dollars by the year; and the said J. N. thereof disseised them. And afterwards the said A. thereinto entered, and deforced the said Proprietors thereof, and still unjustly withholds the same.

No. 25.

Against one who entered by ABATEMENT, after the death of the Brother of the Demandant. [See ante, p. 154.]

SUMMON A. to answer unto B. in a plea of Land, wherein he demands against the said A. one hundred acres of land, with the appurtenances, in C. aforesaid, bounded, &c. which he claims to be his right and inheritance, and whereof one J. S., brother of the said B., whose heir he is, died seised in his demesne as of fee. WHEREUPON he says, that the said J. S., brother of him the said B., whose heir he is, was seised of the demanded

* This form of action is given by *Mass. Stat.* 1783, ch. 39.

† If the tenant would contest the existence of the Proprietary, he must make the objection by a plea in abatement. 1 *Mass. R.* 485, *Prop. of Kennebeck Purchase vs. Call.*

premises, with the appurtenances, in his demesne *as of fee and right*, within thirty years now last past, by taking the profits thereof, to the value of ten dollars by the year; and died so seised thereof, *not having devised the same*. And from the said J. S. the right descended to the said B., who now demands the same; as brother and heir of the said J. S. And afterwards the said A. unjustly and without judgment thereinto entered, and de- forced the said B. thereof, and still unjustly withholds the same.*

No. 26.

Entry sur intrusion,† against the INTRUDER, after the death of the Tenant in Dower.

SUMMON A. to answer unto B. in a plea of Land, wherein he demands against the said A. one messuage with the appurtenan-

* Though the writ in the above form is now very seldom brought, there seems to be no objection to it on legal principles. Perhaps it may be thought, however, that the *analogy of the law* would have been better preserved, if it had been made to resemble the writ of *Intrusion*. It might be framed thus, and brought in all the *degrees*, viz.

SUMMON A. to answer unto B. in a plea of Land, wherein he demands against the said A. one acre of land, with the appurtenances, in C. aforesaid, bounded, &c. which he claims to be *his right and inheritance*, and into which the said A. hath no entry, but by the abatement which he thereinto made, after the death of one J. S., brother of the said B., whose heir he is, within thirty years now last past. WHEREUPON he says that the said J. S., brother of him the said B., whose heir he is, was seised of the demanded premises, with the appurtenances, in his demesne *as of fee and right*, within thirty years now last past, by taking the profits thereof, to the value of ten dollars by the year, and died so thereof seised, *not having devised the same*. And from the said J. S. the right descended to the said B., &c. as above.

† Writs of *Intrusion* are not frequently brought, where the demandant can lawfully enter, and then proceed by writ of Entry in the *Quibus*, upon his own seisin.

ces, in C. aforesaid, bounded, &c. *which he claims to be his right and inheritance*, and into which the said A. hath no entry but by an *intrusion* which he thereinto made, after the death of one M. S. who was wife of J. S. and held the same in dower, of the gift of the said J. S. late her husband, and father of the said B., whose heir he is. WHEREUPON he says, that the said J. S., father of him the said B., *whose heir he is*, was seised of the messuage aforesaid, with the appurtenances, in his demesne *as of fee and right*, to wit, on the tenth day of June, in the year of our Lord, &c.* by taking the profits thereof to the value of twenty dollars by the year; and being so seised, he died, to wit, at C. aforesaid. After whose death the said M. S., who was the wife of the said J. S., held the same, and was thereof seised *in her demesne as of freehold, in dower*, within twenty years now last past, by taking the profits thereof, to the value of twenty dollars by the year. And from the said J. S. *the reversion of* the said messuage, with the appurtenances, descended to the said B., as son and heir of the said J. S. And afterwards, to wit, on the tenth day of June,† in the year of our Lord, &c. the same M. S. died seised of such estate, to wit, at C. aforesaid. And into which the said A. afterwards intruded himself, and still unjustly withholds the same.

No. 27.

Entry sur intrusion in the PER, by two Heirs, after the death of Tenant by the Curtesy.

SUMMON A. to answer unto B. and D. in a plea of Land, wherein they demand against the said A. one messuage, with the appurtenances, in C. aforesaid, bounded, &c. *which they claim to be their right and inheritance*, and into which the said A. hath no entry, but by J. N. who thereinto intruded himself after the

* This time is not limited to thirty years.

† The day of the tenant's death, though usually inserted, is not necessary.

death of J. S., who held the same *as tenant by the curtesy*, after the death of M. S. his late wife, the mother of the said B. and D., whose heirs they are. WHEREUPON they say, that the said J. S. and M., in the right of the said M., were seised of the said messuage, with the appurtenances, in their demesne *as of fee and right*, to wit, on the first day of, &c. in the year,* &c., by taking the profits thereof to the value of ten dollars by the year. And being so seised thereof, the said M. died, to wit, at C. aforesaid; after whose death the said J. S. held the same *as tenant by the curtesy*, and was thereof seised *in his demesne as of freehold by the curtesy*, within thirty years now last past, by taking the profits thereof to the value of ten dollars by the year. And from the said M. *the reversion* of the messuage aforesaid, with the appurtenances, descended to the said B. and D., as sons and heirs of the said M. And afterwards, to wit, on the first day of May,† in the year of our Lord, &c. to wit, at C. aforesaid, the said J. S. died seised of such estate; and into which the said J. N. afterwards intruded himself, and demised the same to the said A. who still unjustly withholds the same.

No. 28.

Entry sur intrusion in the POST, after the death of Tenant for Life, to whom the Demandant had leased.

SUMMON A. to answer unto B. in a plea of Land, wherein he demands against the said A. one hundred acres of land, with the appurtenances, in C. aforesaid, bounded, &c. and into which the said A. hath no entry but *after* the intrusion which one J. N. thereinto made, after the death of J. H. to whom the said B. demised the same, for the term of the life of the said J. H. WHEREUPON the said B. says, that he was seised of the demanded premises with the appurtenances, in his demesne *as of fee*,

* The *time* of the ancestor's seisin in this case, is immaterial.

† The *time* of the death need not be averred, though generally inserted in the precedents.

within thirty years* now last past, by taking the profits thereof to the value of five dollars by the year; and being so thereof seised, he demised the same to the said J. H. for the term of the life of the said J. H.; by virtue whereof the said J. H. was thereof seised *in his demesne as of freehold*, within thirty years now last past, by taking the profits thereof to the value of five dollars by the year; *the reversion thereof* being in the said B. And the same J. H. afterwards, to wit, on the tenth day of March,† in the year of our Lord, &c. to wit, at C. aforesaid, died seised of such estate; and into which the said J. N. afterwards intruded himself; after whom the said A. thereinto entered, and still unjustly withholds the same.

No. 29.

Entry sur intrusion in the POST, after the death of Cestui que vie, by Assignees of the Reversion.

SUMMON A. to answer unto B. and D. in a plea of Land, wherein they demand against the said A. *one messuage with the appurtenances*, in C. aforesaid, bounded, &c. and into which the said A. hath no entry but *after* the intrusion, which one J. N. thereinto made, after the death of T. K., for the term of whose life, J. S. demised the same to J. K. WHEREUPON the said B. and D. say, that the said J. S. was seised of the demanded premises, with the appurtenances, in his demesne *as of fee*, within thirty years now last past, by taking the profits thereof, to the value of five dollars by the year; and being so seised thereof, the said J. S. afterwards, to wit, on the first day of January, in the year of our Lord, &c. at C. aforesaid, demised the same to the said J. K., to have and to hold to him the said J. K., his heirs and assigns, for the term of the life of the said T. K. By virtue whereof the said J. K. was seised of the said messuage, with the appur-

* This is not limited to thirty years.

† The time of tenant's death need not be averred, though usually inserted in the precedents.

tenances, in his demesne *as of freehold*, for the term of the life of the said T. K., within thirty years now last past by taking the profits thereof to the value of five dollars by the year : the reversion thereof in fee simple being in the said J. S. from whom the same afterwards came, by grant and assignment thereof, to the said B. and D. and their heirs and assigns forever. And afterwards, to wit, on the tenth day of March, in the year of our Lord, &c. the said T. K. died, the said J. K. being seised of such estate : and into which the said J. N. afterwards intruded himself : after whom the said A. thereinto entered, and still unjustly withholds the same.

No. 30.

Entry Ad communem legem in the PER, by the Heir, after the Alienation of Tenant in Dower.

SUMMON A. to answer unto B. in a plea of Land, wherein he demands against the said A. one messuage, with the appurtenances, in C. aforesaid, bounded, &c. which he claims to be *his right and inheritance*, and into which the said A. hath no entry but *by M.*, late the wife of J. S., who demised the same to him, and who held the said messuage in dower, of the endowment of the said J. S. late her husband, and father, [*or other ancestor*,] of the said B., whose heir he is. WHEREUPON he says, that the said J. S., father of him the said B., whose heir he is, was seised of the said messuage, with the appurtenances, in his demesne *as of fee and right*, within thirty years now last past, by taking the profits thereof, to the value of twenty dollars by the year ; and being so thereof seised, he died, to wit, at C. aforesaid. After whose death, the said M., who was the wife of the said J. S., held the same, and was thereof seised *in her demesne as of freehold*, as her dower, of the endowment of the said J. S. her said husband ; and being so thereof seised, demised the same to the said A., and died. And from the said J. S. *the reversion of* the said messuage, with the appurtenances, descended to the said B., who now claims the same, as son and heir of the said J. S. And afterwards the

said A. entered into the said messuage, and thereof deforced the said B., and still unjustly withholds the same.*

No. 31.

Entry Ad terminum qui præterit in the REB, by the Heir of the Lessor.

SUMMON A. to answer unto B. in a plea of Land, wherein he demands against the said A. sixty acres of land, with the appurtenances, in C. aforesaid, bounded, &c. which he claims to be *his right and inheritance*, and into which the said A. hath no entry, but by J. S., father of the said B., whose heir he is, who demised the same to the said A. for a term that is past. WHEREUPON *he complains*† that the said J. S., father of him the said B., whose heir he is, was seised of the said premises, with the appurtenances, in his demesne *as of fee* and right, within thirty years now last past, by taking the profits thereof to the value of fifty dollars by the year; and being so thereof seised, demised the same to the said A. for a certain term that is past; after which the same ought to return to the said B., as son and heir to the said J. S. from whom *the right descended* to him. But the said A. still unjustly withholds the same.

* This writ may be brought by the reversioner, after the death of tenant in *dower*, by the *curtesy*, or for *life*, against the *alienees* of such tenants, their heirs or assigns, where they have aliened *in fee*, or *for the life of another*, if such parties hold over. But it is seldom, if ever, resorted to in our practice. The usual course with us is, for the reversioner, whose right of entry is not taken away by the alienation, (unless he suffers twenty years to elapse,) to make an entry, and then sue his *writ of entry in the Quibus*.

† This form is peculiar, and confined to this writ. *See ante*, p. 157.

No. 32.

Entry Ad terminum qui præteriit in the PER, præteriit by the Lessor.

SUMMON A. to answer unto B. in a plea of Land, wherein he demands against the said A. one messuage, with the appurtenances, in C. aforesaid, bounded, &c. and into which the said A. hath no entry, but *by one F. to whom* the said B. demised the same, for a term that is past. **WHEREUPON** *he complains*, that he, the said B., was seised of the said messuage, with the appurtenances, in his demesne *as of fee* and right, within thirty years now last past, by taking the profits thereof to the value of fifty dollars by the year ; and being so thereof seised, demised the same to the said F. for a certain term that is past ; [or, *for the term of three years, fully to be complete and ended, which is past ;*] after which the same ought to return to the said B. But the said A. hath entered into the said messuage by the said F., and still unjustly withholds the same.

No. 33.

Entry Ad terminum qui præteriit in the POST, by the Assignee of the Reversion.

SUMMON A. to answer unto B. in a plea of Land, wherein he demands against the said A. one hundred acres of land, with the appurtenances, in C. aforesaid, bounded, &c. and into which the said A. hath no entry, but *after* the demise which one J. S. thereof made to one E., for a term which is past. **WHEREUPON** *he complains* that the said J. S., at said C., on the tenth day of June in the year of our Lord, &c. was seised of the demanded premises, with the appurtenances, in *his demesne as of fee and right*, by taking the profits thereof to the value of fifty dollars by the year ; and being so thereof seised, demised the same to the said E. for a term that is past ; the reversion thereof in fee

simple being in the said J. S., from whom the same afterwards came by grant and assignment thereof, to the said B., who now demands the same, and to his heirs and assigns forever. And afterwards the said A. thereinto entered, and still unjustly withholds the same.

No. 34.

Entry sur disseisin by Mortgagee against Mortgagor, or any Tenant in possession, alleging a seisin IN FEE AND IN MORTGAGE.

SUMMON A. to answer unto B. in a plea of Land, wherein the said B. demands against the said A. a certain messuage, with the appurtenances, [*according to the description in the deed,*] in C, aforesaid, bounded, &c. whereof the said A. unjustly and without judgment disseised him the said B. within——years now last past. WHEREUPON the said B. says that he was seised of the demanded premises, with the appurtenances, in his demesne as of fee, and in mortgage,* within——years now last past;† and the said A. disseised him thereof, and still unjustly withholds the same.

* This form of alleging a seisin by the demandant *in fee and in mortgage*, and a disseisin by the tenant, is good it seems in all cases; not only where the action is by the mortgagee against the mortgagor, but where the demandant is assignee of the mortgagee, and the tenant is either assignee or grantee of the mortgagor, *in deed or in law*, or a stranger, who is in without title. And where the mortgage is by deed of bargain and sale, with a defeasance, or bond to reconvey, so that the *condition does not appear* upon the face of the deed, in the hands of the mortgagee, this way of declaring seems to be necessary, if the demandant intends to take the *conditional judgment*. 2 Mass. R. 496; ante, p. 227.

† It does not seem necessary, in this case, to aver a taking of the profits; because the mortgagee is not supposed to have been in actual possession.

No. 35.

Entry sur disseisin by an Executor or Administrator, against the Mortgagor, or any tenant in possession, who entered in the lifetime of the Testator or Intestate.

SUMMON A. to answer unto B. executor of the last will and testament [or administrator of the goods and estate] of J. S., late of, &c. deceased, in a plea of Land, wherein the said B., in his said capacity, demands against the said A. one hundred acres of land, with the appurtenances, in C. aforesaid, bounded, &c. whereof the said A. unjustly and without judgment disseised the said J. S. in his lifetime, and within — years now last past. WHEREUPON the said B. says, that the said J. S. was seised of the demanded premises, with the appurtenances in his demesne as of fee, and in mortgage, within — years now last past, and the said A. thereof disseised him. And afterwards the said J. S. died; and the right to hold the demanded premises in mortgage came, by law, to the said B., in his capacity aforesaid, and he ought now to be in quiet possession thereof. Yet the said A. still unjustly withholds the same.*

No. 36.

Entry sur disseisin by an Executor or Administrator, against a Tenant who entered upon the Mortgaged premises, after the Death of the Testator or Intestate.

SUMMON A. to answer unto B., executor of the last will and testament [or administrator of the goods and estate] of J. S.,

* This form is equally appropriate for the executor or administrator of the mortgagee, or any assignee of the mortgage. And if the tenant entered, or was in actual possession, before the death of the testator or intestate, it is immaterial whether he is mortgagor, assignee of the equity of redemption, or, as it seems a stranger. See ante. p. 229.

late of, &c. deceased, in a plea of Land, wherein the said B., in his said capacity, demands against the said A. one dwelling-house, &c. with the appurtenances, in C. aforesaid, bounded, &c. and into which the said A. hath no entry but by the intrusion which he thereinto made, after the death of the said J. S., who held the same *in fee and in mortgage*. WHEREUPON the said B. says, that the said J. S., was seised of the demanded premises, with the appurtenances, in his demesne *as of fee and in mortgage*, within — years now last, past, and died so seised thereof: after whose death *the right* to hold the said premises in mortgage, as aforesaid, came to the said B. in his said capacity, and he ought now to be in quiet possession thereof. And the said A. hath since intruded himself into the said premises, deforced the said B. thereof, and still unjustly withholds the same.

No. 37.

Entry sur disseisin by a Mortgagee, setting forth the Deed of Mortgage with a Profert.

SUMMON A. to answer unto B. in a plea of Land, wherein the said B. demands against the said A. one messuage, &c. with the appurtenances, in C. aforesaid, bounded, &c. whereof the said A. disseised him, the said B., within — years now last past. WHEREUPON the said B. says, that the said A., being seised of the demanded premises, with the appurtenances, in his demesne *as of fee*, on the tenth day of, &c. by his deed of bargain and sale, of that date, duly executed, acknowledged and recorded, (which deed the said B. brings here into court,) for a valuable consideration therein expressed, granted, bargained, and sold the same premises, with the appurtenances, to the said B., to hold the same to him, his heirs and assigns, in *fee and in mortgage*; by force whereof the said B. then and there became seised of the said premises, *in fee and in mortgage*, as aforesaid, and ought now to be in quiet possession thereof. But the said A. hath since unjustly and without judgment thereinto entered, and disseised the said B. thereof, and still unjustly withholds the same.

No. 37, a.

Entry sur disseisin by Assignee of Mortgagee, setting forth the deeds of mortgage and assignment with profert.

SUMMON A. to answer unto B. in a plea of Land, wherein the said B. demands against the said A. one messuage, &c. with the appurtenances, in C. aforesaid, bounded, &c. whereof the said A. disseised him, the said B., within — years now last past. WHEREUPON the said B. says, that the said A., being seised of the demanded premises, with the appurtenances, in his demesne as of fee, on the tenth day of, &c. by his deed of bargain and sale of that date, duly executed, acknowledged and recorded, (which deed the said B. brings here into court,) for a valuable consideration therein expressed, granted, bargained and sold the same premises, with the appurtenances, to one D., to hold the same to him the said D., his heirs and assigns, in fee *and in mortgage*; whereby the said D. then became seised of the demanded premises, in his demesne as of fee *and in mortgage*: and being so seised, the said D. afterwards, on the first day of, &c. by his deed of that date, duly executed, acknowledged and recorded, (which deed the said B. brings here into court,) for a valuable consideration therein expressed, granted, bargained, sold and assigned the same premises, with the appurtenances, to him, the said B., to hold the same to him, his heirs and assigns in fee *and in mortgage*: Whereby the said B. then became seised of the demanded premises in his demesne as of fee *and in mortgage*, as aforesaid, and ought now to be in quiet possession thereof; But the said A. has since unjustly and without judgment thereinto entered, and disseised the said B. thereof, and still unjustly withholds the same.

No. 37, b.

Entry our disseisin by Mortgagee against Mortgagor, setting forth the deed of Mortgage and the condition therein contained.

SUMMON A, to answer unto B, in a plea of Land, wherein the said B, demands against the said A. one messuage, &c. with the appurtenances, in C. aforesaid, bounded, &c. whereof the said A. disseised him, the said B. within — years now last past. WHEREUPON the said B, says, that the said A., being seised of the demanded premises, with the appurtenances, in his demesne as of fee, on the tenth day of, &c. by his deed of bargain and sale of that date, duly executed, acknowledged and recorded, (which deed the said B. brings here into court,) for a valuable consideration therein expressed, granted, bargained and sold the same premises, with the appurtenances, to the said B., to hold the same to him, his heirs and assigns, to his and their sole use forever; subject, however, to a certain proviso or condition, in the same deed expressed, that is to say, that if the said A., his heirs, executors or administrators, should pay to the said B., his executors, administrators or assigns, the sum of — dollars, with lawful interest for the same, on or before the — day of —, according to the condition of the said A.'s certain bond, bearing even date with the deed aforesaid, and made and given by the said A. to the said B, [or according to the tenor of the said A.'s certain promissory note, bearing date on the — day of —, in and by which the said A. promised the said B. to pay him the said sum of — dollars with lawful interest at the time aforesaid,] then the said deed should be void; as by the same deed, reference thereto being had, will more fully appear; whereby the said B. then became seised of the said premises, with the appurtenances, in his demesne as of fee, subject to the condition aforesaid: and the said B. further says that the said A. has not paid to him the said B. the said sum of — dollars, nor any part thereof; and of which said messuage, with the appurtenances, the said A. hath disseised the said B., and still unjustly withholds the same.

No. 38.

Plea in Bar that the Mortgage was made upon an usurious Contract.

AND the said A. comes and defends his right, when, &c. and says, that the said B. his aforesaid action thereof against him ought not to have, because he says, that long before the said B. had any thing in the demanded premises, with the appurtenances, to wit, on the tenth day of March, in the year, &c. he, the said A., was seised of the said premises, with the appurtenances, in his demesne as of fee and right; and being so thereof seised, it was *corruptly*, and contrary to the form of the statute in such case made and provided, agreed by and between the said B. and him the said A., that the said B. should lend and advance unto the said A. the sum of two thousand dollars, and that the said B. should forbear and give day of payment thereof to the said A., until the tenth day of, &c. and that the said A. for the loan of the sum of 2000 dollars, and for the giving day of payment thereof, as aforesaid, for the time aforesaid, should give and pay to the said B. on the said tenth day of, &c. the sum of 300 dollars; making together with the first mentioned sum of 2000 dollars, so to be lent and advanced to the said A. by the said B. as aforesaid, the sum of 2300 dollars; and also that the said A. should pay to the said B. interest on the said sum of \$2300 from the said tenth day of March, in the year, &c. until the time of the payment of the same; and, that for securing the payment of the said sum; of 2300 dollars, with interest for the same as aforesaid, to the said B., he the said A. should make a certain promissory note for the said sum of 2300 dollars, payable to the said B. or his order, on the said tenth day of, &c. with interest as aforesaid, and should also make and seal, and as his act and deed deliver to the said B. a mortgage of the demanded premises, conditioned for the payment of the said sum of 2300 dollars, by him the said A. unto the said B. on the said tenth day of, &c. with interest for the same, according to the tenor of the said promissory note. And the said A. further says, that in pursu-

ance of the said corrupt and unlawful agreement, so made as aforesaid, the said B. afterwards, to wit, on the said tenth day of March, in the year, &c. at C. aforesaid, did lend and advance to him the said A. the said sum of 2000 dollars; and that for securing the repayment thereof, together with the said sum of 300 dollars, so to be paid and given to the said B. as aforesaid, and for the purpose aforesaid, on the said tenth day of, &c. with interest in the mean time, as well for the said sum of 2000 dollars so lent and advanced as aforesaid, as the said sum of 300 dollars, so to be given and paid to the said B. for the purpose aforesaid, making together the said sum of 2300 dollars as aforesaid, the said A. then and there did make a certain promissory note, for the said sum of 2300 dollars, payable to the said B. or his order, on the said tenth day of, &c. with interest; and did also make and seal, and as his act and deed deliver to the said B. a mortgage of the demanded premises, conditioned for the payment of the said sum of 2300 by him the said A., to the said B., on the said tenth day of, &c. with interest as aforesaid; and the said B. then and there accepted and received the said promissory note, and the said mortgage of and from the said A., in pursuance of the said corrupt and unlawful agreement, and for the purpose aforesaid. And the said A. avers, that the said sum of 300 dollars, so agreed to be given and paid to the said B. for the purpose aforesaid, and the interest of the said sum of 2300 dollars, so reserved and made payable to the said B. by the promissory note and mortgage aforesaid, exceeds the rate of six pounds for the forbearing and giving day of payment of one hundred pounds for one year; contrary to the form of the statute in such case made and provided; by means whereof, and by force of the said statute, the said mortgage was and is wholly void in law. And the said A. further says, that the said B., at the time of suing forth his writ aforesaid, or at any time before or since, never had any thing in the demanded premises with the appurtenances, or any right or title to the same, but by force of the mortgage thereof made by the said A. to the said B. in the manner, and for the cause, aforesaid. And this the said A. is ready to verify; wherefore he prays judgment if the said B. his aforesaid action thereof against him ought to have, &c.

No. 39.

Plea of PAYMENT or TENDER, by the Mortgagor to the Mortgagee, after the Breach of the Condition.

AND the said A. comes and defends his right, when, &c. and says that the said B. his aforesaid action thereof against him ought not to have, because he says, that long before the said B. had any thing in the demanded premises, to wit, on the first day of June in the year, &c. he the said A. was seised of the demanded premises, with the appurtenances, in his demesne as of fee and right; and being so thereof seised, on the same day, by his deed of bargain and sale, of that date, conveyed the same to the said B., to have and to hold the same to the said B., his executors, administrators or assigns, in fee and in mortgage; and upon this condition, that if the said A., his executors, administrators or assigns, should pay to the said B., his executors, administrators or assigns, the sum of one thousand dollars, on or before the tenth day of, &c. with lawful interest for the same, then the said mortgage, and also a certain promissory note made by the said A. to the said B. for the payment of the said sum of one thousand dollars, and interest, by the time aforesaid, should both be void. And the said A. further says, that after the said tenth day of, &c. and before the suing forth of the writ aforesaid, of the said B. in this behalf, to wit, on the twenty-fifth day of, &c. he the said A. [paid to the said B., and the said B. received from him, the said A., the sum of —— dollars, being the full amount of the principal sum due to the said B., and the interest thereof, to the said time of payment;] with this that the said A. will aver, that the said B. never had any thing in the demanded premises, with the appurtenances, or any interest or title in or to the same but by force of the mortgage thereof, made to him by the said A. in form aforesaid. And this he is ready to verify; wherefore he prays judgment if the said B. his aforesaid action thereof against him ought to have, &c.*

* The same form may be used in a plea of *tender* after breach of the condition, by omitting what is included between *brackets*, and

No. 40.

Entry by an Executor or Administrator, for lands set off on Execution.

SUMMON A. to answer unto B., executor of the last will and testament [*or administrator of the goods and estate*] of J. S. late of C. &c. in a plea of Land, wherein he demands *in his said capacity* of executor, [*or administrator,*] against the said A. one messuage, with the appurtenances, in C. aforesaid, bounded, &c. whereof the said A. unjustly and without judgment disseised him, within thirty years now last past. WHEREUPON the said B. says, that he was seised of the demanded premises, with the appurtenances, in his demesne *as of fee*, and *in his capacity* of executor of the last will and testament [*or administrator of the goods and estate*] of the said J. S. deceased, within thirty years now last past, by taking the profits thereof, to the value of ten dollars by the year; and the said A. disseised him thereof, and still unjustly withholds the same.

No. 41.

Prayer of AID by a Tenant by the Curtesy.

AND the said J. W. comes and says, that long before the suing forth of the writ aforesaid of the said A. B., one M. S. was

inserting in its place the following, viz. [*was ready and willing to pay, and then and there tendered and offered to pay, to the said B., the sum of——dollars, being the full amount of the principal sum due to the said B., and the interest thereof, to the said time of tendering payment as aforesaid; to receive which sum of the said A. the said B. wholly refused. And the said A. further says, that since that day he has *always been ready*, and still is ready, to pay the same to the said B., and he now brings the said sum of——dollars here into court, ready to be paid to the said B., if he will accept the same.*]

seised of the tenements aforesaid, with the appurtenances, in her demesne as of fee; and being so thereof seised, took for her husband him the said J. W., whereby the said J. and M. became seised of the tenements aforesaid, with the appurtenances, in their demesne as of fee, *in right of the said M.* And they, being so thereof seised, had issue, one M., now the wife of W. C.; and afterwards the said M., the wife of him the said J. W., died, and he the said J. survived her, and held the tenements aforesaid, with the appurtenances, and was thereof seised in his demesne as of freehold, as tenant thereof *by the curtesy*. And so the said J. says, that he holds, and, at the day of suing forth the writ of the said A. B., did hold the tenements aforesaid, with the appurtenances, for term of his life, as tenant *by the curtesy*, in form aforesaid; the reversion thereof, after the death of him the said J., belonging to the said M., the wife of the said W. C., and her heirs forever; *without whom* the said J. cannot bring the tenements aforesaid, with the appurtenances, into plea, nor answer the said A. B. thereof. And he *prays the aid* of the said W. C. and M.; and it is granted to him &c.*

No. 41. a,

Summons ad Auxiliandum, in a Writ of Right.

COMMONWEALTH OF MASSACHUSETTS.

M. ss. To the Sheriff of our County of M. or his Deputy,
L. s. Greeting.

Whereas A. B. of, &c. in our Court of Common Pleas, &c. demanded against J. W. of, &c. one messuage, with the appurtenances, in C. bounded, &c. as the right and inheritance of the said A. B. *by our writ of Right*, as it is said; and the said J. W. afterwards came into our said court, and said that he was seised of the tenements aforesaid, with the appurtenances, in his demesne as of freehold, for the term of his life only; the rever-

* See Rast. 26, b. 27; 3 Chit. Pl. 645; 2 Bos. and Pul. 384; 2 Saund. 45, c. in note.

sion thereof belonging to M., the wife of W. C., and her heirs forever; *and prayed aid* of the said W. C. and M., which was granted him.

WE COMMAND YOU, THEREFORE, that you *summon* the said W. C. and M., his wife, (if they may be found in your precinct,) to appear before our Justices of our said Court of Common Pleas, next to be held at C., &c. to answer, together with the said J. W., in the aforesaid plea, if they will. And have you there this writ with your doings therein. Witness, &c.*

No. 42.

Prayer to be received to defend, &c.

AND thereupon J. S. comes here into court, in his own proper person, and says that the tenements aforesaid, with the appurtenances, *are his right*; because, he says, that on the day of suing forth the writ aforesaid of the said B., the said A. had nothing in the tenements aforesaid, with the appurtenances; but that he, the said J. S., on the same day, and long before, was, and yet is, seised thereof, in his demesne as of fee; and being so thereof seised, on the tenth day of April, &c. he demised to the said A. the tenements aforesaid, with the appurtenances, for the term of the life of the said A.; by virtue of which demise the said A. was seised thereof, in his demesne as of freehold; and so the said J. S. says, that the said A. holds the tenements aforesaid, with the appurtenances, for the term of his life, by the demise of the said J. S.; the reversion thereof, after the death of the said A. pertaining to him, the said J. S.: and this he is ready to verify. Wherefore, inasmuch as he comes before judgment is rendered, *he prays that he may be admitted in this behalf, &c.* and he is admitted accordingly.† See *Rast.* 285, a.

* See *Rast.* 271, b; 2 *Saund.* 45 d. in note; 3 *Chit. Pl.* 650.

† Upon the RECEIT being allowed, the demandant counted against the party received, much in the same way as against a *vouchee*, thus: And hereupon the said B. demands against the said J. S. the tenements aforesaid, with the appurtenances, &c.

No. 43.

OATH of the Sheriff, when the Jury are to have a view.

· YOU SWEAR that you will take charge of this jury, and take them upon the premises in question, and there suffer them to *view the same*, as they shall think necessary, and all such lines, monuments, and boundaries, as shall be shown them by either party : that you will not permit the parties to enter into a debate relative to the premises, in the hearing of the jury, or any person to speak to them upon the subject, unless it be A. B. on the part of the demandant, and C. D. on the part of the tenant, to point out such lines, monuments, and boundaries, as they shall deem expedient for the determination of the issue between them ; and that you will keep the jury together, until they shall return into court. So HELP YOU GOD.

No. 44.

Summons AD WARRANTIZANDUM.

COMMONWEALTH OF MASSACHUSETTS.

M. ss. *To the Sheriff of our County of M. or his Deputy,*
L. s. *Greeting.*

WHEREAS B. of, &c. in our Court of Common Pleas, held, &c. demanded against A. of, &c. one messuage, with the appurtenances, in C. bounded, &c. as the right and inheritance of the said B., *by our writ of Entry sur disseisin in the post*, as it is said. And the said A. came into our said court, and brought with him the deed of J. N. of, &c. by which the said J. N. granted the said messuage, with the appurtenances, to one J. S. (whose estate the said A. has in the said messuage, with the appurtenances ;) and, by his said deed, covenanted to warrant and defend the same to the said J. S., his heirs and assigns forever ; and vouched the said J. N. to warranty, which was granted him.

WE COMMAND YOU THEREFORE, that you *summon* the said J. N. (if he may be found in your precinct,) to appear before our Justices of our said Court of Common Pleas, next to be held at C., &c. to warrant and defend the said A. in the plea aforesaid, *if he will*. And have you there this writ, with your doings therein. Witness, &c.

No. 45.

Plea in Abatement, ALIENAGE of the demandant.*

AND the said A. comes and defends his right, when, &c. and says, that the said B. ought not to be answered to his writ aforesaid, because he says that the said B. is *an alien*, born in foreign parts, to wit, in England, within the allegiance of the king of the United Kingdom of Great Britain and Ireland,† and out of the allegiance of the Commonwealth of Massachusetts: and of any of the United States; and this he is ready to verify, &c.: wherefore he prays judgment if the said B. to his writ aforesaid ought to be answered, &c.

No. 46.

Plea of GENERAL NON TENURE to the Writ.

AND the said A. comes and defends his right, when, &c. and says, that he cannot render the messuage aforesaid, with the appurtenances, (or *the tenements aforesaid with the appurtenances*,) to the said B., because, he says, that he is not, nor was at the time of suing forth the writ aforesaid, of the said B., or at any time since, *tenant thereof as of freehold*; and this he is

* See some remarks upon this plea, and the several replications which may be made to it. *Ante*. p. 178.

† It does not seem to be necessary to state the place of the demandant's birth, or under what allegiance he was born.

ready to verify. Wherefore he prays judgment of the said writ, and that the same may be quashed, &c.

No. 47.

Plea of SPECIAL NON-TENURE to the Writ.

AND the said A. comes and defends his right, when, &c. and says, that he cannot render the tenements aforesaid, with the appurtenances, to the said B., because he says that he is not, nor was at the time of suing forth the writ aforesaid, of the said B., or at any time since, tenant thereof, as of freehold; but one C., of, &c. long before the suing forth of the said writ, to wit, on, &c. was seised of the tenements aforesaid, with the appurtenances, in his demesne, as of fee, (or *freehold*.) and being so thereof seised, afterwards, to wit, on, &c. demised the same to the said A., to have and to hold to him, his executors, administrators, or assigns, from the day of, &c. *for the term of five years*, fully to be complete and ended. By virtue whereof the said A. entered into the said tenements with the appurtenances, and became possessed of such estate therein as aforesaid; and had not at the time of suing forth the said writ, nor at any time since, any estate therein but for a term of years, in form aforesaid, the freehold thereof then, ever since, and still being in the said C.; and this he is ready to verify. Wherefore he prays judgment of the said writ, and that the same may be quashed, &c.

No. 48.

General NON-TENURE as to one Moiety, in Abatement, and NON-DISSEISIVIT as to the Residue.*

AND the said A. comes and defends his right, when, &c. and as to one undivided moiety of the said messuage, with the ap-

* Perhaps in our practice there is no occasion to plead in this manner, in any case. The better and more convenient course seems to be to *disclaim*, or plead *non-tenure* as to part *in bar*, and *non-disseisivit* as to the residue.

purtenances, says, that he cannot render the same to the said B., because, he says, that he is not, nor was at the time of suing forth the writ aforesaid of the said B., or at any time since, *tenant thereof as of freehold*; and this he is ready to verify. Wherefore, as to that moiety of the said messuage, with the appurtenances, he prays judgment of the said writ, and that the same may be quashed, &c.

And as to all the residue of the said messuage, with the appurtenances, the said A. says, that he *did not disseise* the said B. of the same residue of the said messuage, with the appurtenances, in manner and form as the said B. hath thereof, in his writ and count aforesaid, above supposed. And of this he puts himself upon the country, &c.

No. 49.

Replication to a Plea of NON-TENURE, taking Issue upon the Plea.

AND the said B. says, that his said writ, by reason of any thing by the said A. before alleged, ought not to be quashed; because he says that the said A., at the time of suing forth the writ aforesaid, of him the said B., to wit, on the tenth day of, &c. was tenant of the messuage aforesaid, with the appurtenances, *as of freehold*, as by the said writ is above supposed. And this he prays may be inquired of by the country, &c.

No. 50.

Plea of JOINT-TENURE by one who is SUED ALONE, with Profert of the Deed.*

AND the said A. comes and defends his right, when, &c. and says, that he holds, and on the day of suing forth the writ afore-

* It seems that the plea, that another or others ought to have been joined as tenants in the writ, is taken away by the *Stat. of Mass. 1795, ch. 75.*

said of the said B., and always afterwards, held the tenements aforesaid, with the appurtenances, *jointly with one J. S. of, &c. (or jointly with M. the wife of the said A.)* of the gift and grant of one J. N. to them the said J. S. and A. [or *A. and M.*] and their heirs jointly, and not severally : which the said A. brings here into court, the date whereof is at C. on, &c. Which said J. S. is still surviving, and in full life, to wit, at C. aforesaid ; and this he is ready to verify. Wherefore, inasmuch as the said J. S. is not named in the said writ, the said A. prays judgment of that writ, and that the same may be quashed, &c.

No. 51.

Replication to a Plea of JOINT-TENURE, taking Issue on the Plea.

AND the said B says that his said writ, by reason of any thing by the said A. before alleged, ought not to be quashed ; because he says, that the said A., at the time of suing forth the writ aforesaid of him the said B., to wit, on the first day of June, in the year of our Lord, &c. was *sole tenant of the freehold* of the aforesaid messuage, with the appurtenances, as by the said writ is above supposed. Without this that the said J. S. had any thing in the same. And this he prays may be inquired of by the country, &c.

And the said A. likewise,

No. 52.

Plea that the demandant is JOINT-TENANT with another, not named in the Writ.

AND the said A. comes and defends his right, when, &c. and says, that the said B. never had any thing in the messuage aforesaid, with the appurtenances, *except jointly with one J. S. of, &c.* who is still surviving and in full life, to wit, at C. aforesaid ; and this he is ready to verify. Wherefore, inasmuch as the said J.

S. is not named in the said writ, the said A. prays judgment of that writ, and that the same may be quashed, &c.

A replication, taking issue upon this plea, may be very easily framed from the preceding, No. 51.

No. 53.

To a Writ of Entry in the Quibus against two, one disclaims, and the other takes the Sole or Entire-tenure, and pleads over, Non disseisivit.

AND the said A. and D. come and defend their right, when, &c. and the said A. says that he cannot render the messuage aforesaid, with the appurtenances, to the said B., because he says that he is *not tenant thereof as of freehold*, nor was at the time of suing forth the writ aforesaid of the said B., nor at any time after; nor ever had any thing in the said messuage, with the appurtenances, nor claimed, nor now claims, to have any thing therein; but utterly disavows and disclaims to have any thing in the same; and this he is ready to verify. Wherefore he prays judgment of the said writ, and that the same may be quashed, &c.

And the said D. says, that he is *sole tenant as of freehold*, of the messuage aforesaid, with the appurtenances, and was at the time of suing forth the said writ; *without this*, that the said A. ever had any thing in the same. And the said D. says that he did not disseise the said B. of the aforesaid messuage, with the appurtenances, as the said B. in his writ aforesaid hath above supposed; and this he is ready to verify. Wherefore he prays judgment if the said B. his action aforesaid thereof against him ought to have, &c.

No. 54.

Replication to the last Plea, taking Issue.

AND the said B. says, that by reason of any thing by the said D. above alleged, he ought not to be precluded from having his

action aforesaid thereof against him, because, he says, that the said D. unjustly and without judgment *disseised him*, the said B., in manner and form as the said B., by his writ aforesaid, hath complained. And this he prays may be inquired of by the country, &c.

And the said D. likewise, &c.

No. 55.

To a Writ of Entry against two jointly, each pleads Non-tenure with a Disclaimer, as to the other's part, and Several-tenure as to the Residue.

AND the said A. and D. come and defend their right, when, &c. and the said A., as to two third parts of the messuage aforesaid, with the appurtenances, [or, *as to sixty acres, parcel of the said one hundred acres of land, with the appurtenances, being the southerly part thereof, bounded, &c.*] says, that at the time of suing forth the writ aforesaid of the said B., he, the said A., was *sole tenant thereof* as of freehold; *without this* that the said D. on the day aforesaid, or at any time afterwards, had any thing in the same. And the said A. says that he did not disseise the said B. of the aforesaid messuage, with the appurtenances, as the said B. in his writ aforesaid hath above supposed; and this he is ready to verify. Wherefore he prays judgment, if the said B. his action aforesaid thereof against him ought to have, &c.

And the said D. as to one third part of the messuage, aforesaid with the appurtenances, [or, *as to forty acres, parcel of the said one hundred acres, &c.*] says that at the time of suing forth the writ aforesaid of the said B., he the said D. was *sole tenant thereof* as of freehold, &c. *as before*. Wherefore he prays judgment, &c.

No. 56.*

Replication taking Issue on the above Pleas.

AND the said B. says, that his said writ, by reason of any thing by the said A. and D. before alleged, ought not to be quashed, because he says, that at the time of suing forth the writ aforesaid of him the said B., to wit, on the first day of March in the year of our Lord, &c. the said A. and D. *were joint-tenants* of the messuage aforesaid, with the appurtenances, as by the said writ is above supposed. And this he prays may be inquired of by the country, &c.

And the said A. and D. likewise.

See Rast. 364, b ; 365, a.

No. 57.

To a Writ in the PER, Plea that the Tenant did not enter by the Person named in the Writ.

AND the said A. comes and defends his right, when, &c. and says that by the writ aforesaid of the said B. it is supposed that the said A. had his entry into the tenements aforesaid *by the said J. N.* Whereas the said A. had his entry into the said tenements *by one J. S.*, and not by the said J. N., as by the writ aforesaid is

* No. 56, Referred to *ante* p. 132.

Plea that the writ should have been in the *PER* and *CUR*, and not in the *PER*.

And the said A. comes and defends his right, when, &c. and says that by the writ aforesaid of the said B. it is supposed that the said A. had his entry into the tenements aforesaid, by *one J. N.* Whereas the said A. had his entry into the said tenements, *by one J. S. to whom* the said J. N. demised the same and not by the said J. N., as by the writ aforesaid is supposed : and this he is ready to verify. Wherefore he prays judgment of the said writ, and that the same may be quashed, &c.

supposed : and this he is ready to verify. Wherefore he prays judgment of the said writ, and that the same may be quashed, &c. *See Rastell, 249, a ; Booth, 179.*

No. 58.

Replication to the above Plea, taking Issue.

AND the said B. says, that his said writ, by reason of any thing before alleged, ought not to be quashed, because he says that the said A. had his entry into the tenements aforesaid *by the said J. N.*, as by his writ aforesaid is above supposed. And this he prays may be inquired of by the country, &c.

And the said A. likewise, &c.

No. 59.

Plea PUIS DARREIN CONTINUANCE, that the Demandant has ENTERED into the demanded Premises, and disseised the Tenant thereof.

AND now at this day, that is to say, on the second Monday of September, A. D. 1824, until which day the plea aforesaid was last continued, comes the said A. by his attorney aforesaid, and prays judgment of the writ aforesaid, of the said B., because, he says, that *after the last continuance of this cause*, and before this day, that is to say, on the first day of July now last past, the said B. unjustly and without judgment *entered into the said messuage, &c.* with the appurtenances, in the writ of the said B. mentioned, and *disseised the said A. thereof*, and is still tenant of the same, by his disseisin aforesaid ; and this he is ready to verify. Wherefore he prays judgment of the said writ, and that the same may be quashed, &c.

No. 60.

Replication to the preceding Plea, taking Issue.

AND the said B. says that his said writ, by reason of any thing by the said A. before alleged, ought not to be quashed, because,

he says, that he *has not entered into the said message, with the appurtenances, and disseised the said A. thereof*, since the last continuance of this cause, in manner and form as the said A. in his plea aforesaid hath above alleged ; and this he prays may be inquired of by the country, &c.

No. 61.

Plea PUIS DARREIN CONTINUANCE, Marriage of a Feme Sole ; one of the Demandants.*

AND now at this day, that is to say, on the second Monday, &c. until which day the plea aforesaid was last continued, comes the said A. by his said attorney, and prays judgment of the writ aforesaid of the said B. C. and D., because, he says, that after the last continuance of this cause, and before this day, that is to say, on the tenth day of, &c. the said Mary D. in the said writ mentioned, *took to her husband and was joined in marriage with one John T.*, now the husband of the said Mary, to wit, at C. aforesaid ; and this he is ready to verify. Wherefore he prays judgment of the writ aforesaid, and that the same may be quashed, &c.

No. 62.

Plea PUIS DARREIN CONTINUANCE, Death of one of the Demandants.*

AND now at this day, that is to say, on the second Monday, &c. until which day the plea aforesaid was last continued, comes the said A. by his said attorney, and prays judgment of the writ aforesaid of the said B. C. and D. because, he says, that after the last continuance of this cause, and before this day, that is to say, on the tenth day of, &c. *the said James B. in the said writ*

* Since the former edition of this work was published, these pleas are taken away in *Massachusetts by stat. 1826, ch. 70.*

mentioned, died, to wit, at S. in the county of C. aforesaid; and this he is ready to verify. Wherefore he prays judgment if the court will further proceed therein, &c.

No. 63.

Plea of General issue, NON DISSEISIVIT, to a writ of Entry in the QUIBUS, upon the Seisin of the Demandant.

AND the said A. comes and defends his right, when, &c. and says that he *did not disseise the said B.* in manner and form as he in his writ aforesaid hath above supposed; and of this he puts himself upon the country, &c.

And the said B. likewise.

No. 64.

The same Plea to a writ upon the Seisin of the Demandant's Ancestor.

AND the said A. comes and defends his right, when, &c. and says that he *did not disseise the said J. S.* in manner and form as the said B. in his writ aforesaid hath above supposed; and of this he puts, &c.

No. 65.

The same Plea to a Writ of Entry in the PER, the PER and CUI, or the POST.

AND the said A. comes and defends his right, when, &c. and says that the said J. N. *did not disseise the said B.* [or the said J. S. father or other ancestor of the said B.] in manner and form as the said B. in his writ aforesaid, hath above supposed; and of this he puts, &c.

No. 66.

Plea of NON-TENURE, in Bar.

AND the said A. comes and defends his right, when, &c. and says, that the said B. his aforesaid action thereof against him ought not to have, because, he says, that he is not, nor was at the time of suing forth the writ aforesaid of the said B., nor at any time since, *tenant of the said messuage*, with the appurtenances, therein mentioned, *as of freehold*; and this he is ready to verify. Wherefore he prays judgment if the said B. his aforesaid action thereof against him ought to have, &c.

No. 67.

Replication to the above Plea, taking Issue.

F AND the said B. says, that by reason of any thing above alleged, he ought not to be precluded from having his aforesaid action thereof against the said A., because, he says, that the said A., at the time of suing forth the writ aforesaid of him the said B., *was tenant of the said messuage*, with the appurtenances, *as of freehold*, in manner and form as by the said writ is above supposed. And this he prays may be inquired of by the country, &c.

No. 68.

Plea of NON DISSEISIVIT as to part and a DISCLAIMER, as to the Residue.

AND the said A. comes and defends his right, when, &c. and as to ten acres of land, &c. with the appurtenances, parcel of the tenements aforesaid, bounded, &c. says, that *he did not disseise the said B.* in manner and form, as he by his writ aforesaid hath above supposed; and of this he puts himself upon the country, &c. And as to all the residue of the tenements aforesaid, with

the appurtenances, the said A. says, that he *has nothing therein, nor claimed to have*, on the day of suing forth the writ aforesaid of the said B., nor ever after; but to have any thing therein *wholly disavows and disclaims*; and this he is ready to verify. Wherefore he prays judgment if the said B. his aforesaid action thereof against him ought to have, &c.

No 69.

Replication to a Plea of DISCLAIMER, taking Issue.

AND the said B. says, that by reason of any thing above alleged, he ought not to be precluded from having his aforesaid action thereof against the said A., because, he says, that the said A., at the time of suing forth the writ aforesaid of him the said B., and long afterwards, *did claim and hold* the tenements aforesaid with the appurtenances, in manner and form as the said B., by his writ aforesaid, hath above supposed; to wit, at C. aforesaid. And this he prays may be inquired of by the country, &c.

No. 70.

Plea in Bar, a CONVEYANCE of the Premises by the Demandant to a Stranger, in Fee Simple.

AND the said A. comes and defends his right, when, &c. and says, that the said B. his aforesaid action thereof against him ought not to have, because, he says, that long before the suing forth of the writ aforesaid of the said B., to wit, on the tenth day of, &c. the said B., by his deed of bargain and sale, of that date, duly executed and delivered, for a certain good and valuable consideration in the said deed expressed, *granted, bargained and sold* to one J. N. the whole of the said messuage, with the appurtenances, in the writ aforesaid of the said B. mentioned; to have and to hold the same to the said J. N., his heirs and assigns forever; by force of which deed the said J. N., before the suing forth of the writ aforesaid of the said B., became seised of the said messuage, with the appurtenan-

ces, in his demesne as of fee and right; and this he is ready to verify. Wherefore he prays judgment if the said B. his aforesaid action thereof against him, for the recovery of the tenements aforesaid, ought to have, &c.

No. 71.

Replication to the last Plea, THAT NOTHING PASSED by the Deed mentioned in the tenant's Plea.

AND the said B. says, that by reason of any thing above alleged, he ought not to be precluded from having his aforesaid action thereof against the said A. because, [*protesting* that the deed aforesaid in the plea of the said A. above mentioned was never delivered by him the said B. to the said J. N. for replication nevertheless in this behalf,*] the said B. says that *nothing in the messuage aforesaid, with the appurtenances, ever passed from him the said B. to the said J. N.* by force of the deed aforesaid, in manner and form as by the plea aforesaid of the said A. is above supposed; and this he is ready to verify. Wherefore he prays judgment, and his seisin of the tenements aforesaid, with the appurtenances to be adjudged to him, &c.

No. 71. a.

Plea that the Demandant, who sues as Minister, had RESIGNED HIS OFFICE pending the writ.

AND the said A. comes and defends his right, when, &c. and says, that the said B. his aforesaid action thereof against him ought not further to have or maintain, because he says that after the commencement of this action, to wit, on the — day of, &c. the said B. freely relinquished and resigned his said office of minister of the said first parish in C. aforesaid; [*or was duly and*

* The protestation between brackets may perhaps be as well omitted.

legally dismissed from his said office of minister, &c.] and this the said A. is ready to verify; wherefore he prays judgment if the said B. his aforesaid action thereof against him ought further to have or maintain, &c.

No. 72.

PRAYER that the Jury may inquire as to the Increased Value of the Premises, by reason of Buildings and Improvements.*

AND the said A. further says, that he the said A. and those under whom he claims, have been in the actual possession of the tenements aforesaid with the appurtenances, for the space of six years and more, next before the suing forth of the writ of the said B. in this action, and have greatly increased the value thereof, by virtue of the buildings and improvements by them made upon the same. He therefore prays that the jury who shall try the issue above joined, (if they shall find a verdict for the said B.) may also inquire, and by the said verdict ascertain, the increased value of the said tenements, by reason of the buildings and improvements made thereon, by the said A., and those under whom he claims as aforesaid.

No. 73.

PRAYER of the Demandant, that the Jury may inquire as to the Value of the Premises without the Improvements.

AND the said B. on his part also prays, that the jury aforesaid, (if they find the increased value of the said tenements by reason of the buildings and improvements aforesaid,) may also, by their verdict, ascertain what would have been the value thereof, if no buildings or improvements had been made thereon, by the said A., and those under whom he claims as aforesaid.

* This prayer, when necessary, is usually added to a plea of the general issue.

No. 74.

VERDICT for the Demandant, with a Finding of the Value of the Improvements, &c.

THE jury find that the said A. did disseise the said B. in manner and form as he in his writ aforesaid hath thereof complained.

And they further find the increased value of the said tenements, by reason of the buildings and improvements made thereon by the said A., and those under whom he claims, to be — dollars.

They also find that the value of the said tenements, if no such buildings or improvements had been made thereon by the said A., and those under whom he claims, would have been — dollars.

No. 75.

Count in a Writ of DOWER in Massachusetts.

SUMMON A. to answer unto M. S.* who was the wife of J. S. late of, &c. deceased, in a plea of Dower, wherein she demands against the said A. the third part of one messuage, [or of sixty acres of land, &c.] with the appurtenances, in C. bounded,† &c. as the dower of the said M. of the endowment of the said J. S. her said husband, whereof she hath nothing. WHEREUPON the said M. complains and says, that the said J. S. her said husband, during the coverture of the said M. with the said J. S., was seised of the messuage aforesaid, [or of the said sixty acres of

* When the action is brought by husband and wife, the form is thus; "To answer unto J. N. and M. his wife, (which said M. was formerly the wife of J. S. late of, &c. deceased,) in a plea of Dower wherein they demand.

† If the lands are known by any particular name, they need not be described by *metes and bounds*. 10 *Mass. R.* 60, *Ayer vs. Spring*

land,] with the appurtenances, in his demesne as of fee ; and that since the decease of the said J. S. her said husband, and more than one month before the suing forth of this writ, to wit, on the tenth day of, &c. she, the said M., demanded* of the said A., then, and ever since, tenant in possession, and having the immediate estate of freehold in the said messuage, [*or the said sixty acres of land,*] to assign and set out to her the said M. her reasonable dower therein, which the said A. hath refused to do, and still deforceth the said M. thereof.

No. 76.

Plea in ABATEMENT, NO DEMAND made one Month before suing forth the Writ.

AND the said A. comes and† says, that the said M. did not demand of him the said A. to assign and set out to the said M. her reasonable dower, of and in the messuage aforesaid, with the appurtenances, one month before the time of suing forth the writ aforesaid of the said M., in manner and form as by the said writ is above supposed ; and this he the said A. is ready to verify. Wherefore, he prays judgment of the said writ, and that the same may be quashed, &c.

No. 77.

Plea in ABATEMENT, NO DEMAND upon the Person who took the next immediate Estate of Freehold.

AND the said A. comes and says, that upon the death of the said J. S., late husband of the said M., the messuage aforesaid

* Though the stat. 1783, ch. 40, requires a demand, it does not seem necessary to insert this averment in the count. But it appears to have been the uniform practice ; and it is therefore retained.

† In pleas to writs of Dower, DEFENCE is always omitted. *Booth*, 118 ; *Rast.* 232, b. 233, a ; 3 *Chit. Pl.* 599, 600.

with the appurtenances, descended to T. S., and W. S., as sons and heirs of the said J. S., and that they, the said T. and W., took and had the next immediate estate of freehold and inheritance therein, after the death of the said J. S., and that the said M. *never made any demand* of them the said T. and W., or either of them, to assign and set out to her, the said M. her reasonable dower of and in the aforesaid messuage, with the appurtenances; and this the said A. is ready to verify. Wherefore he prays judgment of the writ aforesaid of the said M., and that the same may be quashed, &c.

No. 78.

Plea in BAR NE UNQUES ACCOUPLE in loyal matrimonie.

AND the said A. comes and says, that the said M. ought not to have her dower of the tenements aforesaid, [or *the said messuage*,] with the appurtenances, as having been the wife of the said J. S., because, he says, that the said M. *never was accoupled* [or, *never was joined*] to the said J. S. deceased, in lawful matrimony; and this the said A. is ready to verify. Wherefore he prays judgment if the said M. ought to have her dower of the tenements aforesaid, [or, *the said messuage*,] with the appurtenances, &c.

No. 79.

Replication to the above Plea, taking Issue.

AND the said M. says, that she ought not, by reason of any thing in the plea aforesaid of the said A. above alleged, to be barred from having her reasonable dower in the tenements aforesaid, [or, *the said messuage*,] with the appurtenances, because, she says, that she, the said M. on, &c. *was accoupled* [or, *was joined*] to the said J. S. deceased, in lawful matrimony, to wit, at, &c. and this she prays may be inquired of by the country, &c.

No. 80.

Plea in BAR, NE UNQUES SEISE QUE DOWER.

AND the said A. comes and says, that the said M. ought not to have her dower of the messuage aforesaid, with the appurtenances, of the endowment of the said J. S. heretofore the husband of the said M., because, he says, that the said J. S. was not, on the day on which he married the said M., or ever after, *seised of such estate* of and in the said messuage, with the appurtenances, whereof she demands dower, that he could endow the said M. thereof. And of this the said A. puts himself upon the country, &c.

No. 81.

Plea THAT THE HUSBAND IS LIVING.

AND the said A. comes and says, that the said M. ought not to have her dower of the tenements aforesaid, with the appurtenances, because, he says, that the said J. S., of whose endowment the said M. demands the same, *is surviving and in full life*, to wit, at, &c.; and this he is *ready to verify*. Wherefore he prays judgment if the said M. ought to have her dower of the said tenements, with the appurtenances, &c.

No. 82.

Replication to the above Plea, AFFIRMING THE DEATH OF THE HUSBAND.

AND the said M. says, that she ought not, by reason of any thing in the plea aforesaid of the said A. above alleged, to be barred from having her reasonable dower in the tenements aforesaid, with the appurtenances, because, she says, that the said J. S., her said husband, of whose endowment she demands the same, died at, &c. on the tenth day of, &c. and this she prays may be inquired of by the country, &c.

No. 83.

Plea that the TENANT HAS ALREADY ASSIGNED DOWER.

AND the said A. comes and says, that the said M. her action* aforesaid thereof against him ought not to have, because, he says, that he, the said A., after the death of the said J. S., *assigned and set out* to the said M. ten acres of land, with the appurtenances, of the aforesaid thirty acres of land, to have and to hold the same to the said M. for the term of her life, as her dower, accruing to her of and in the aforesaid thirty acres of land, with the appurtenances; to which said assignment *the said M. assented and agreed*; and this the said A. is ready to verify. Wherefore he prays judgment if the said M. her aforesaid action thereof against him ought to have, &c.

No. 84.

Replication to the preceding Plea, DENYING THE ASSIGNMENT, and taking Issue.

AND the said M. says, that by reason of any thing in the plea aforesaid of the said A. above alleged, she ought not to be barred from having her aforesaid action thereof against him, because she says, that the said A. did not assign and set out to her, the said M., the aforesaid ten acres of land, with the appurtenances, as the dower of her the said M., accruing to her of the aforesaid thirty acres of land, as the said A. in his plea aforesaid hath above alleged. And this she prays may be inquired of by the country, &c.

* This plea, not denying the demandant's right to be endowed, begins and concludes differently from the preceding pleas. See *Rast.* 229, a. pl. 6.

No. 85.

Plea that the Demandant has BARRED HERSELF OF DOWER, by joining with her Husband in the CONVEYANCE of the Premises.

AND the said A. comes and says, that the said M. ought not to have her dower of the tenements aforesaid, with the appurtenances, as of the endowment of the said J. S., heretofore the husband of the said M., because, he says, that the said J. S., on the tenth day of, &c. being seised of the said tenements in his demesne as of fee, by his deed of that date, duly acknowledged and recorded, for a valuable consideration therein mentioned, granted, bargained, and sold the said tenements, with the appurtenances, to one J. N. in fee simple; and that the said M. of her own free will, with the consent of the said J. S. her said husband, testified by her signing and sealing the same deed with him, for the consideration aforesaid, *relinquished and forever renounced all her right and claim to dower*, in the said tenements, with the appurtenances, to the said J. N., who thereby became seised thereof in his demesne as of fee, absolutely exempt* and discharged from all right and claim of dower therein by the said M.; and this the said A. is ready to verify. Wherefore he prays judgment, if the said M. ought to have her dower, of the tenements aforesaid with the appurtenances, &c.

No. 86.

CONFESSION of the Demandant's Right to be endowed, with a SUGGESTION that the Estate has been greatly improved and increased in Value, since the Alienation by the Husband.

AND the said A. comes and says, that he cannot deny the action aforesaid of the said M., nor but that the said M. ought to

* If the Demandant is not barred by the deed she has executed, the facts by which the effect of her deed is avoided should be set forth in her replication. See ante, 262, 263.

be endowed of the tenements aforesaid, with the appurtenances, as of the endowment of the said J. S., heretofore the husband of the said M. But the said A. says, that the said J. S. in his lifetime, to wit, on the, &c. by his deed of that date, duly acknowledged and recorded, for a valuable consideration therein mentioned, granted, bargained, and sold the tenements aforesaid, with the appurtenances, to one J. N. in fee simple; which estate of the said J. N. in the said tenements, with the appurtenances, the said A. now has. And the said A. further says, that the said tenements, since the conveyance thereof by the said J. S. to the said J. N., as aforesaid, *have been greatly improved and increased in value* by the said J. N., and those who have held the said tenements under him, and especially by him the said A., and that *he has always been ready*, from the time of the death of the said J. S., and yet is ready, to render to the said M. her reasonable dower in the said tenements, with the appurtenances, according to the just rights of the said M., in respect of the improvements and increased value thereof, as aforesaid. And the said A. prays that the improvements and increased value of the said tenements, made as aforesaid, may be inquired of, *in such* manner as the court here shall consider, &c.

No. 87.

Writ of SEISIN OF DOWER in Massachusetts.

WHEREAS M. who was the wife of J. S. deceased, before our Justices, &c. did recover *seisin* against A. of one third part of a certain messuage, with the appurtenances, in C. aforesaid, in the possession of, &c. as her dower, of the endowment of the said J. S. her said husband, by our writ of Dower, whereof she hath nothing. THEREFORE we command you, that to the said M. full *seisin* of one third part of the aforesaid messuage, with the appurtenances, you cause to be had without delay, to hold to her, the said M., in severalty, by *metes and bounds*. We command you also, that of the goods and chattels of the said A. within your precinct, you cause to be paid and satisfied unto the said

M., at the value thereof in money, the sum of ——— for damages awarded her by our said court, for her being held and kept out of her dower aforesaid, and cost expended on this suit with ——— more for this writ; and thereof to satisfy yourself your own fees. And for want of goods, &c.

No. 88.

FORMEDON IN THE DESCENDER by two Parceners or co-heirs*.

SUMMON A. to answer unto M. S. and E. S. in a plea of Land, wherein they demand against the said A. one messuage, with the appurtenances in C. aforesaid, bounded, &c. which W. H. late of, &c. gave to one T. S., the son of J. S., and the heirs of the said T. of his body issuing, and which, after the death of the said T., ought to DESCEND to the said M. and E. daughters and heirs of the said T., according to the form of the gift aforesaid. WHEREUPON they say, that the said W. H. gave the messuage aforesaid, with the appurtenances, to the said T. S., son of the aforesaid J. S., and to the heirs of the said T. of his body issuing, in form aforesaid, by which gift the same T. was thereof seised in his demesne as of fee and right, by the form of the gift aforesaid, within twenty years now last past, by taking the profits thereof to the value of ten dollars by the year. And from the said T. S. the *right* descended to them, the said M. and E., who now demand the same, as daughters and heirs of the said T. S., according to the form of the gift aforesaid: And which, after the death of the said T. ought to have descended to them, the said M. and E., in form aforesaid. And the said A. hath thereinto entered, and unjustly deforced them of the same.

* This is the usual form, where the demandants are coparceners; and it is also the proper form for co-heirs in our practice.

No. 89.

Plea of the General issue, NON DEDIT, or Ne dona pas.

AND the said A. comes and defends his right, when, &c. and says that the said M. S. and E. S. their action aforesaid thereof against him ought not to have, because, he says, that the said W. H. *did not give* the aforesaid messuage, with the appurtenances, to the said T. S., the son of the said J. S. and to the heirs of the said T. S. of his body issuing, in manner and form as the said M. and E., in their declaration aforesaid, have above supposed. And of this he puts himself upon the country, &c.

And the said M. S. and E. S. likewise, &c.

No. 90.

FORMEDON IN THE DESCENDER by the Heir of the Remainderman in Tail, upon a Gift to Husband and Wife.

SUMMON A. to answer unto B. in a plea of Land, wherein he demands against the said B. one hundred acres of land, with the appurtenances, in C. bounded, &c. which W. H. gave to J. S. and M. his wife, and the heirs of the bodies of them, the said J. and M. issuing; so that if the said J. and M. should die, without heirs of their bodies issuing, that then the said land, with the appurtenances, should remain to T. H. the son of J. H. of C. aforesaid, and to the heirs of the body of the said T. issuing; and which after the death of the said J. S. and of the said T. H. and of W., the son of the said T. H., ought to DESCEND to him, the said B., son and heir of the said W., and grandson and heir of the same T. H. according to the form of the gift aforesaid; because the said J. S. and M. died without heirs of their bodies issuing. WHEREUPON he says, that the said W. H. gave the said hundred acres of land, with the appurtenances, to the aforesaid J. S. and M., and to the heirs of the bodies of them the said J. and M. issuing, so that if the same J. and M. should die without heirs of their bodies issuing, that then the said hun-

dred acres of land, with the appurtenances, should remain to the aforesaid T. H., the son of the aforesaid J. H. of C., and to the heirs of the body of the said T. H. issuing, in form aforesaid; by which gift the said J. S. and M. were thereof seised in their demesne as of fee and right, according to the form of the gift aforesaid, within —— years now last past, by taking the profits thereof to the value of one hundred dollars by the year. And from the said J. S. and M. for that they died without heirs of their bodies issuing, the tenements aforesaid with the appurtenances, *remained* to the aforesaid T. H., son of the said J. H., which said T., after the death of the said J. S., and M., entered into the tenements aforesaid, with the appurtenances, and was thereof seised in his demesne as of fee and right, according to the form of the gift aforesaid, within —— years now last past, by taking the profits thereof to the value of one hundred dollars by the year. And from the said T. the right descended, according to the form of the gift aforesaid, to one W., son and heir of the said T., and from the said W. the right descended, according to the form of the gift aforesaid, to the said B., who now demands the same, as son and heir of the said W. And which, after the death of the said W., ought to have descended to him, the said B., in form aforesaid. And the said A. hath thereinto entered, and unjustly deforced him of the same.

No. 91.

Plea in BAR, A FEOFFMENT (or Conveyance) with Warranty by the Ancestor of the Demandant.

AND the said A. comes and defends his right, when, &c. and says, that the said B. his aforesaid action thereof against him ought not to have, because, (protesting that the said W. H. did not give the tenements aforesaid, with the appurtenances, to the said J. S. and M. his wife, in manner and form as the said B., in his writ aforesaid, hath above supposed, for plea in this behalf) he says, that the said T. H., the grandfather of the said B., whose heir he is, that is to say, son of W., son of the said T. H., was seised of the tenements aforesaid, with the appurtenances, in his

demesne as of fee ; and being so thereof seised, by his certain *Deed*, sealed with his seal, which the said B. produces here in court, the date whereof is the tenth day of March, in the year, &c. gave, granted, bargained, sold, and confirmed to one W. M. the tenements aforesaid, with the appurtenances, by the name of one hundred acres of land, with the appurtenances, lying in C. in the county of M. bounded, &c. to have and to hold the same to him, the said W. M., his heirs and assigns forever. And the said T. H. *bound himself and his heirs by the said deed to warrant* the tenements aforesaid, with the appurtenances, to him the said W. M., his heirs and assigns, against all persons, &c. by virtue of which grant, bargain, sale, and confirmation, the said W. M. was thereof seised in his demesne as of fee ; which estate of the said W. M. in the tenements aforesaid, with the appurtenances, the said A. now hath ; and says, that *sufficient descended to the said B. from the said T. H., his grandfather, by hereditary descent in fee simple*, to the value of the tenements aforesaid, with the appurtenances, to wit, at L. in the county of M. aforesaid ; and this he is ready to verify. Wherefore he prays judgment if the said B., *contrary to the said deed of the said W., his ancestor, which contains the warranty aforesaid*, his action aforesaid for the recovery of the tenements aforesaid, with the appurtenances, against him the said A. ought to have, &c.

No. 91, a.

Replication, denying that he has ANY THING BY DESCENT from the Ancestor who made the Warranty.

AND the said B. says, that by any thing above alleged, he ought not to be precluded from having his action aforesaid, for the recovery of the tenements aforesaid, with the appurtenances, against him the said A., because, he says, that nothing descended to him, the said B., from the said T. H., his grandfather, in manner and form as the said A. hath above alleged. And this he prays may be inquired of by the country, &c.

And the said A. likewise, &c.

No. 92.

FORMEDON IN THE REVERTER *by the Heir of the Donor.*

SUMMON A. to answer unto B. in a plea of Land, wherein he demands against the said A. one messuage, &c. with the appurtenances, in C. bounded, &c. which W. H., uncle of the said B., whose heir he is, gave to T. S., the son of J. S. of C., and the heirs of his body issuing; and which, after the death of the said T. S., and of W. S., son and heir of the said T. S., ought to REVERT to the said B., because the said W., son and heir of the said T., died without heirs of his body issuing. WHEREUPON he says, that the said W. H., uncle of him the said B., was seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, within twenty years now last past, by taking the profits thereof to the value of sixty dollars by the year; and being so seised, gave the tenements aforesaid, with the appurtenances, to the aforesaid T. S., and to the heirs of his body issuing, in form aforesaid; by which gift the said T. S. was thereof seised in his demesne as of fee and right, by form of the gift aforesaid, by taking the profits thereof, to the value of sixty dollars by the year. And from the said T., the right descended, by the form of the gift aforesaid, to the said W., as son and heir of the said T.; and from the said W., the son of the said T., (for that the said W. died without heirs of his body issuing,) the right *reverted* to the said W. H., the uncle of the said B., as to the donor of the tenements aforesaid, with the appurtenances; and from the said W. H. the donor, *the right descended to him the said B.*, who now demands the same, as cousin and heir of the said W. H.; that is to say, son and heir of one J. H., brother and heir of the said W. H. And which, after the death of the said T. and the said W., for that the said W. died without heirs of his body issuing, ought to have *reverted* to him the said B., in form aforesaid. And the said A. hath thereinto entered, and unjustly deforced him of the same.

No. 93.

FORMEDON IN THE REMAINDER, *by Remainder-man in Tail, after the death of the Donee in Tail without Issue, with a Profert of the Deed, &c.*

SUMMON A. to answer unto B. in a plea of Land, wherein he demands against the said A. a certain messuage, with the appurtenances, in C. bounded, &c. which W. H. gave to T. S. and the heirs of his body issuing, so that if the said T. should die without heirs of his body issuing, the said messuage, with the appurtenances, should *remain* to the said B. and the heirs of his body issuing; and which, after the death of the said T., ought to *remain* to the aforesaid B., according to the form of the gift aforesaid, because the said T. died without heirs of his body issuing, &c. WHEREUPON he says, that the said W. H. gave the messuage aforesaid, with the appurtenances, to the aforesaid T. S. and to the heirs of his body issuing, so that if the said T. should die without heirs of his body issuing, the said messuage, with the appurtenances, should remain to the said B. and the heirs of his body issuing; by which gift the said T. S. was seised of the messuage aforesaid, with the appurtenances, in his demesne as of fee and right, according to the form of the gift aforesaid, within twenty years now last past; by taking the profits thereof to the value of twenty dollars by the year. And from the said T., because he died without heirs of his body issuing, *the right remained*, by the form of the gift aforesaid, to the said B., who now demands the same. And which, after the death of the said T., ought to have *remained* to the said B., in form aforesaid. And the said B. brings here into court a certain deed under the hand of the said W. H., which sufficiently attests the gift and remainder aforesaid, in form aforesaid, the date whereof is the tenth day of June in the year, &c. And the said A. hath thereinto entered, and unjustly deforced him of the same.

No. 94.

FORMEDON IN THE REMAINDER by Devisee of the Remainder in Fee, after the Death of Devisee for Life.

SUMMON A. to answer unto B. in a plea of Land, wherein he demands against the said A. one messuage, with the appurtenances, in C. bounded, &c. which J. S. gave to M., the wife of the said J. S., for the term of the life of the said M., so that the said messuage, with the appurtenances, after the death of the said M. ought to *remain* to the said B. and to his heirs and assigns forever. WHEREUPON he says, that the said J. S., on the tenth day of March, in the year, &c. was seised of the messuage aforesaid, with the appurtenances, in his demesne as of fee and right, by taking the profits thereof to the value of sixty dollars by the year; and being so thereof seised, on the same day aforesaid, by his last will and testament in writing, duly executed, and afterwards by the Judge of Probate for the said county, proved, approved, and allowed, devised the messuage aforesaid, with the appurtenances, to the said M., wife of the said J. S., during the life of the said M.; the *remainder* thereof, after the death of the said M., to the said B. and to his heirs and assigns forever; by virtue of which devise the said M. within twenty years now last past, was thereof seised in her demesne as of freehold, according to the form of the gift aforesaid, by taking the profits thereof to the value of sixty dollars by the year. And after the death of the said M., *the right remained, according to the form of the gift aforesaid*, and by virtue of the devise aforesaid, to the said B., who now demands the same. And which, after the death of the said M., ought to have *remained* to the said B. in form aforesaid. And the said A. hath thereinto entered, and unjustly deforced him of the same.

No. 95.

Plea in Bar, NON DEVISAVIT.

AND the said A. comes and defends his right, when, &c. and says, that the said B. his aforesaid action thereof against him ought not to have, because, he says, that the said J. S. deceased *did not devise** the messuage aforesaid, with the appurtenances, to the said M., the wife of the said J. S., for the term of her life, and the remainder thereof, after the death of the said M., to the said B., his heirs and assigns forever, in manner and form, as by the writ aforesaid of the said B., is above supposed. And of this he puts himself upon the country, &c.

No. 96.

FORMEDON IN THE REMAINDER by the Heirs of the Remainderman in Fee after several Remainders in Tail.

SUMMON A. to answer unto B. and D. in a plea of Land, wherein they demand against the said A. one messuage, with the appurtenances, in C. bounded, &c. which J. C. Esq. gave to J. C. his son, and the heirs of the body of the said J. C. the son issuing, so that if the said J., the son, should die without heirs of his body issuing, the said messuage, with the appurtenances, should *remain* to H., the brother of the said J. C., the son, and the heirs of his body issuing; and if the said H. should die without heirs of his body issuing, the messuage aforesaid, with the appurtenances, should *remain* to R., the brother of the said H., and to his heirs and assigns forever. And which, after the death of the said J. C. the son, and the said H. and R. ought to *remain* to the aforesaid B. and D., as cousins and heirs of the said R., according to the form of the gift aforesaid; because, the said J. C. the son, and the said H. and R. died without heirs of their bodies issuing.

* *Non Devisavit* is not strictly a general issue. See ante p. 308.

WHEREUPON they say, that the said J. C. Esq. gave the messuage aforesaid, with the appurtenances, to the aforesaid J. C. his son, and the heirs of the body of the said J. C. the son issuing, so that if the said J. C. the son should die without heirs of his body issuing, the messuage aforesaid, with the appurtenances, should *remain* to the said H., the brother of the said J. C., the son, and the heirs of the body of the said H. issuing; and if the said H. should die without heirs of his body issuing, the messuage aforesaid, with the appurtenances, should *remain* to the said R. brother of the said H., and to his heirs and assigns forever, in form aforesaid. By force of which gift the said J. C., the son, was seised of the messuage aforesaid, with the appurtenances, in his demesne as of fee and right, according to the form of the gift aforesaid, within twenty years now last past, by taking the profits thereof to the value of twenty dollars by the year. And after the death of the said J. C., the son, and the said H. and R., for that each of them the said J. C. the son, and the said H. and R. died without heirs of their respective bodies issuing, the right *remained* to the said B. and D., who now demand the same, as cousins and heirs of the aforesaid R.; that is to say, as sons and heirs of M., sister and heir of the said R. And which, after the death of the said R., ought to have *remained* to the said B. and D. in form aforesaid. And the said A. hath thereinto entered, and unjustly deforceth them of the same.

No. 97

WRIT OF RIGHT on the Seisin of the Demandant.

SUMMON A. to answer unto B. in a plea of land, wherein the said B. demands against the said A. one messuage, with the appurtenances, in C. aforesaid, bounded, &c. which he claims to be the right and inheritance of him the said B. BY OUR WRIT OF RIGHT.

WHEREUPON the said B. says, that he was seised of the tenements aforesaid, with the appurtenances, in his demesne as of

fee and right, within thirty years now last past, by taking the profits thereof to the value of twenty dollars by the year, and ought now to be in quiet possession thereof. Yet the said A. unjustly withholds the same, &c.

No. 98.

WRIT OF RIGHT by Husband and Wife, upon the Seisin of her Ancestor.

SUMMON A. to answer unto B. and M. his wife, in a plea of Land, wherein they demand against the said A. one messuage, with the appurtenances, in C. aforesaid, bounded, &c. which they claim to be the *right and inheritance* of the said M. BY OUR WRIT OF RIGHT. Whereupon the said B. and M. say, that J. S. deceased, whose heir she the said M. is, was seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, within forty years now last past, by taking the profits thereof to the value of fifty dollars by the year. And from him the said J. S., for that he died without issue, the right of the tenements aforesaid, with the appurtenances, descended to T. S., his brother and heir. And from the said T. S. the right of the tenements [aforesaid, with the appurtenances, descended to W. S., son and heir of the said T. S. And from the said W. S. the right of the said tenements, with the appurtenances, descended to the said M., daughter and heir of the said W. S., and wife of the said B. ; and they now demand the same, as the right of the said M., and say they ought to be in quiet possession thereof. Yet the said A. unjustly withholds the same, &c.

No. 99.

Plea in BAR to a Writ of Right, Denial of the Ancestor's Seisin.*

AND the said A. comes and defends *the Right* of the aforesaid B. *and his seisin, &c.* and says, that the aforesaid J. S. late father [or *other ancestor*] of the said B. *was not seised of the tenements aforesaid*, with the appurtenances, or any part thereof, in his demesne as of fee and right, in manner and form as the said B. in his writ aforesaid hath above supposed: And of this the said A. puts himself upon the country, &c.

No. 100.

JOINDER OF THE MISE upon the mere Right.

AND the said A. comes and defends the right of the said B. [*the demandant,*] and the seisin of the said J. S. (*the ancestor named in the count,*) when, &c. and whatsoever else he ought to defend, and chiefly of the tenements aforesaid with the appurtenances, as of *fee and right*, and puts himself upon the country, &c. and prays a recognition to be made, whether he the said A. has greater right or title to hold the tenements aforesaid, with the appurtenances, to him and his heirs, as he now holds the same; or whether the said B., the demandant, has title to hold the same tenements with the appurtenances, as he has above demanded the same, &c.

And the said B. likewise, &c.

* See 3 Chit. Pl. 654, and 10 Wentw. Pl. 215, 220, several special pleas in bar, in writs of Right. But a special plea does not seem to be either necessary or advisable. The only inducement to plead a special bar in the English courts, is to avoid the delay and difficulty, as well as expense, of trying the issue upon the mere Right by the Grand assize. In our practice that reason does not exist; the issue upon the mere Right being tried in the same manner as other issues of fact.

No. 101.

Action for the MESNE PROFITS.

ATTACH the goods, &c. of A. to answer unto B. in a *plea of trespass*, for that the said A., heretofore, to wit, on the, &c. with force and arms, broke and entered a certain messuage of the said B. in C. bounded, &c. [*the premises are usually described as in the action by which they have been recovered,*] and ejected, expelled, and amoved the said B. from the possession and occupation thereof, and continued him so expelled and amoved therefrom, for a long space of time, to wit, from the day and year aforesaid, until and upon the tenth day of, &c. [*the day on which he took possession,*] and during all the time aforesaid, took and received to the use of him, the said A., all the issues and profits of the said tenements, being of great value, to wit, of the value of two hundred dollars by the year. Whereby the said B., during all the time aforesaid, lost the issues and profits of the said tenements, with the appurtenances, and was wholly deprived of the use, improvement, and enjoyment of the same.

NOTE. If any particular *damage, waste or other injury* has been committed by the tenant, while he held the possession, it may be recovered in this action. But the injury must be *stated specially* in the declaration. *Ante*, p. 373.

Note A. referred to at p. 60.

Containing several ANCIENT RECORDS of proceedings in the COURTS of the COLONY AND PROVINCE of MASSACHUSETTS, for the recovery of *Real Property*, to the end of the 17th CENTURY.

1. At a County Court held at Cambridge, the fifth day of the second month, 1653.

Mr. Robert Spencer, plaintiff, against Capt. Simonds Willard, Executor of the estate of Richard Hyde, deceased, *for deteyning of an estate* left him by the said Richard Hyde, to the value of Eighty pounds.

The Jury finde for the defendant, according to the last will of the said Richard Hyde, recorded in Court, and costs of Court, six shillings.

[ACTION ON THE CASE.]

2. At a County Court held at Cambridge, the fourth day of the eighth month, 1653.

Master John Glover, plaintiff, against Mr. Henry Dunster, in *an action of the case for withholding certain lands and houses*, of right appertaining to him, in Cambridge. The Jury findeth for the plaintiff all those lands, with the houses thereon, whereof Elizabeth, the mother of the said John Glover, was seised, in the time of her widowhood, in Cambridge, that the said John Glover is the proper heir thereof, and costs of Court.

[ACTION ON THE CASE.]

3. At a County Court held at Cambridge, Oct. 15, 1656.

Scottow and Lake, Trustees of Gibbens, *vs.* Henry Dunster and Joseph Cooke, Guardians of Mary Cooke, in an *action of the case for deteyning a parcell of land*, about twelve acres, late in the occupation of *Squa Sachem*. The defendants appearing in Court, acknowledged they were legally summoned by the plaintiffs; and the plaintiffs' letter of attorney was openly read in

court. The pleas of both parties were heard, and evidences respectively read, which are on file with the records of this Court. The Jury find for the plaintiffs the land in controversie, and *damage ten shillings*, and costs of Court, £1. 4. 4. Execution was granted to Mr. Scottow 13, 8mo. 1656.

[SPECIAL VERDICT.]

4. At a County Court held at Charlestown, Dec. 16, 1663.

Ruth Mead, plaintiff, against William Dowdy and Solomon Phipps, *for deteyning a parcell of land* which was her husband's. Both parties appeared in Court, the said Ruth appearing by her attorney, John Smith. The defendants confessed that the land sued for was sometime in the possession of William Cole, deceased.

The Jury having heard the case, brought in a *special verdict*, viz. for the plaintiff, in case she be the heyre of James Cole. The BENCH determined that the said Ruth Mead is the heyre of the said James Cole, during her life; and do find for her, and costs of Court, six shillings and six pence.

[ACTION ON THE CASE.]

5. At a County Court held at Charlestown, June 17, 1673.

Joseph Broadish, plaintiff, against Dr. Leonard Hoar, Capt. Thomas Savage, Mr. Peter Brackett and John Broadish, defendants, *in an action of the case for the title of the houses and lands* which were sometime Robert Broadish's, deceased, lying and being in Cambridge. The parties summoned appeared; and after a full hearing of their pleas and evidences, the Jury brought in their verdict, finding for the plaintiff the title of the houses and lands sued for, according to the tenor of the attachment, and costs of court.

[MORTGAGE.]

6. At a County Court held at Charlestown, Dec. 15, 1674.

Richard Lowder, plaintiff, against John Cole, senior, *in an action on the case, for not giving possession of a parcell of land*, situate on the north east end of his house, according to a mort-

gage, dated, &c. Both parties appeared and joined issue in the case. The jury, having heard their pleas and evidences, brought in their verdict, finding for the plaintiff the land forfeited by the mortgage, and costs of court.

[MORTGAGE.]

7. At a County Court held at Cambridge, Oct. 3, 1676.

Mr. Samuel Appleton, plaintiff, against Caleb Church, defendant, *in an action of the case, for the possession of five eighth parts of the corn-mill in Watertown.* Both parties appeared and joined issue in the case. The Jury, having heard the several pleas and evidences in the case, brought in their verdict, finding for the plaintiff all Mr. Payne's right in the said mills and land, according to the mortgage, and costs.

[REVIEW.]

8. At a County Court held at Boston, July 27, 1680.

William Hallowell, Junior, Benjamin Hallowell, and Edward Ashley, who married Mary Hallowell, or their lawful attorney, plaintiffs, *contra* Stephen Butler, senior, defendant, *in an action of review* of an action prosecuted by the now plaintiffs against the said Stephen Butler, at a County Court in Boston, in July last, for withholding under pretence of right, by executorship to Mary Ward, late wife of Benjamin Ward, *and other false pretences*, an estate to the value of four hundred pounds, or thereabout, which did belong unto Benjamin Ward aforesaid, and now is the proper right of the plaintiffs, who are the right and undoubted heirs of said Benjamin Ward, &c. according to attachment.

The attachment and evidences in the case produced, being read and committed to the Jury, which are on file, the Jury brought in their verdict, that they found for the plaintiffs the house, lands, and appurtenances thereunto belonging sued for, and costs of court. The defendant appealed from this judgment, unto the next Court of Assistants, and gave bond for prosecution to effect.

8. [The appellees having recovered judgment in the Court of Assistants, the following WRIT OF POSSESSION was issued by that court.]

To John Greene, Marshall General.

IN HIS MAJESTY'S NAME, you are required to levy by way of Execution on the houses, lands, and appurtenances thereunto belonging, as in the judgment of the county Court above written, and as is there expressed; and also in costs in money from Stephen Butler, the sum of £6. 6. and deliver the same, with two shillings for this execution, to William Hallowell, Benjamin Hallowell, and Edward Ashley, or their attorney, which is a satisfaction of the judgment of the Court of Assistants, sitting in Boston the 1st of September last, confirming the same; making your return as the law directs.

Dated in Boston, this 9th of November, 1680.

By the Court. EDWARD RAWSON, *Sec'y.*

I hereby depute *Marshall Return Wayte*
to extend this execution. Dec. 2, 1680.

Jno. Greene, Marshall Gen.

[ACTION BY AN ADMINISTRATRIX, TO RECOVER LAND.]

9. At a County Court held at Boston, July 29, 1684.

Ann Sheffield *alias* Perry, plaintiff, *contra* Joseph Holmes of Boston, defendant, in an action of the case for that the said Holmes has possessed himself in, and doth refuse to give her possession of, a parcell of land and buildings thereon, lying at the south end of Boston, near the wind-mill point, which of right doth belong to the plaintiff, it being lately her husband Sheffield's, deceased; letters of administration being granted to the plaintiff, with all due damages. The attachment and evidence in the case produced being read, and committed to the Jury, which are on file, the Jury brought in their verdict, they found for the plaintiff possession of the house and land sued for, and costs of Court.

[WRIT OF POSSESSION.]

To John Greene, Marshall General, or his lawful Deputy.

You are hereby required in HIS MAJESTY'S NAME to *give possession* of the house and land mentioned in the County Court's judgment, &c.

[MORTGAGE.]

10. At a County Court held at Charlestown, 16 4th month, 1685.

Joseph Holmes, assignee of Mrs. Sarah Gilbert, widow, plaintiff, against Capt. Lawrence Hammond, defendant, in an action of the case for refusing to give the plaintiff possession of a house and land, lying and being situate in Charlestown, which house and land is the plaintiff's just right, as shall appear by mortgage or deed of sale, under the hand and seal of the said Lawrence Hammond, bearing date the 21 of June, 1623, with all other due damages, &c. The Jury brought in their verdict, finding for the plaintiff the house and land mortgaged by the defendant, and possession to be given accordingly, and costs of court.

[EJECTMENT ACCORDING TO THE ENGLISH PRACTICE. APPEAL
TO THE KING IN COUNCIL.]

11. AT A COURT OF APPEALS, GRAND ASSIZE AND GENERAL GAOL DELIVERY, holden at Boston, in the County of Suffolk, in the territory and dominion of New England, Nov. 2, 1686, *Annoque R. Rs. Jacobi Angliæ, &c. Secundi, Secundo.*

Before the Hon. Joseph Dudley, Esq. President, &c.

Wm. Stoughton, Esq. Dep'y. Pres't.

Peter Bulkley,
Richard Wharton,
Bart. Gidney,
Edward Randolph,
Waite Winthrop,
John Usher, and
Edward Ting,

} Esquires, and of the
Councill.

Elisha Cooke, John Wiswall, sen., John Wiswall, jun. and John Floyd, appellants, *versus* Daniel Turrell, lessee of Capt. Nicholas Paige, and dame Anna Paige, his wife, appellees, from the verdict of a Jury and Judgment of the Court of Pleas,

holden for his Majesty at Boston, for the county of Suffolk, on the 27th day of July, 1686, *Annoque R. Rs. Jacobi Angliæ, &c. Secundi, Secundo.* That is to say,

Daniel Turrell, pl. *versus* Giles Dire, upon a writ of *Ejectionis firmæ* for two messuages or tenements situate, lying, and being at Rumney Marsh, and one acre of pasture land in Boston, in the county of Suffolk. Captain Nathaniel Thomas, attorney to Daniel Turrell, lessee of Capt. Nicholas Paige, and dame Anna, his wife, the lessors of the plaintiff, appearing, and Elisha Cooke in behalf of Elizabeth Cooke and Isaack Lewis, John Wiswall, sen. John Wiswall, jun. and John Floyd, tenants in possession, were admitted defendants, and entered into the following *RULE.* viz.

It is ordered, by the consent of Nathaniel Thomas, attorney to Daniel Turrell, lessee of Capt. Nicholas Paige, and Anna Paige, plffs. and Elisha Cooke for Elizabeth Cooke, Isaack Lewis, John Wiswall, sen. and John Wiswall, jun. and John Floyd, for themselves, in the county aforesaid, for that the said Elisha Cooke, &c. are allowed defdts. who are without delay to appear, and plead by themselves or attorney, to a general issue, at this court; and at the trial thereon to be made, the said Cooke *et al.* shall appear in their own proper persons or by their counsell or attornies, and acknowledge a *Lease, Entry, and Ouster*, or that in defect, judgment shall be entered against the *casual ejector*; but further prosecution against him is suspended, until the said Elisha Cooke, *et al.* have made a default in some of the premises. And by the consent of counsell, it is ordered further by the court, that the aforesaid Elisha Cooke *et al.* shall take no advantage against the plfs. for his not prosecuting upon the trial, occasioned by such kind of defect. But that the aforesaid Elisha Cooke *et al.* shall pay the plf's costs of Court to be appointed. And it is further ordered, that the said Daniel Turrell, lessee of Capt. Nicholas Paige and Anna Paige plffs. shall pay the costs of the defendants, which the said Court shall appoint or adjudge.

At the said Court by adjournment, August 5, 1686 :

The pleas of both parties being fully heard, and evidences read, the case was committed to the Jury, who returned their verdict

thereon ; they found for the plfs. the lands and tenements sued for, and costs of court.

It is therefore considered by the court, that the plaintiffs shall recover the aforesaid lands and tenements, and additional damages for costs of suit.

The defendants appealed from this judgment to his Majesty's next court of Appeals and Grand Assize, to be holden at Boston, before the *Hon. his Majesty's President and Council* for this, his Majesty's territory and Dominion of New England, Nov. the 2d. 1686.

And accordingly at this day the said Appellants, Elisha Cook, John Wiswall, sen. John Wiswall, jun. and Jno. Floyd, came into this court, and defended the wrong and injury when, &c. and say, (as in the former Court they said,) that they are not guilty of the trespass and ejectment, as the appellants had objected against them : Therefore the Provost Marshall is commanded to summon a Jury to try the said case between the said appellees, Daniel Turrell, lessee of Capt. Nicholas Paige and, dame Anna Paige, his wife, and the said Appellants, for that the said Appellants, as well as the said appellees, have put themselves upon the Jury, &c. And the said Provost Marshall did, according to the command of the court, present a pannel to try the said case ; and the pleas of both parties being fully heard, and evidences read, the said case was committed to the Jury, viz. Joseph Lynds, Sampson Sheafe, Francis Burroughs, William White, Daniel Brewer, John Brock, John Minot, Peter Woodard, William Deane, Samuel Goffe, John Hammond, and John Mosse, who being required to give their verdict in the said case, being impannelled and sworn as aforesaid, and the Marshall sworn to keep them, and they returned into court, and do say upon their oaths, that they find for the Appellees confirmation of the verdict of the former Jury, viz. they found for the appellees the lands and tenements sued for, and costs of courts.

Therefore it is considered by the said court, that the aforesaid plaintiff *ought to recover his aforesaid term yet to come*, of and into the said two messuages or tenements, situate, lying and being at Rumney Marsh in the township of Boston, and also the said acre

of pasture land in Boston, all in the County of Suffolk aforesaid, with their appurtenances to enter.

And now the said Appellants, Elisha Cook, John Wiswall, sen. John Wiswall, jun. and John Floyd, appealed from the said judgment of this his Majesty's court of Appeals and Grand Assize to HIS MAJESTY IN COUNCIL; which appeal was allowed by the court, upon condition that the said appellants forthwith give bond, with sufficient sureties, to the value of one thousand pounds sterling, unto the said Capt. Nicholas Paigè *et al.* that they, the said Appellants, by themselves or their lawful attorney, do draw forth from the Secretary and Clarke of the said Court, copies of the Records, Judgments, Pleas, and Evidences on both sides, and lay the same before *his sacred Majesty in Council*, and prosecute the said appeal to effect, so as to show forth, before his Majesty's government for the time being for this territory, *within nine months next coming*, (or such further time as his Majesty shall please to allow,) his majesty's final judgment and resolution in the said case of Appeals, and his direction thereon, and pay such costs as shall be determined by his Majesty, within — days next after the return of such judgment.

[TRESPASS FOR AN INTRUSION.]

12. At a County Court, held at Cambridge, April 7, 1691.

George Read, plaintiff, *versus* William Pearse, defendant.

In an *action of trespass* for that the said William Pearse hath entered upon and taken possession of a dwelling-house and housing, both barns, orchard, yard, garden, &c. situate in Woburn, which was formerly the estate of Henry Summers of said Woburn, deceased, whereof he died seised, and devised the same, by his last will and testament, unto Mehitable Summers, his widow and relict, with full power to sell the same, to supply her wants for the comfort of her life; which house and land is the estate of George Read by purchase of the said Mehitable Summers, &c.

Both parties appearing, and the court and Jury having heard and considered the pleas and evidences respectively tendered, which are on file with the Records of this Court, the jury brought in their verdict, finding for the defendant costs of Court.

[ACTION ON THE CASE.]

13. At a Court of Assistants holden at Boston, September 22, 1691, on appeal from the County Court held at Salem, June 30, 1691.

John Burnam, jun. of Chebacco of Ipswich, appellant,

versus.

Robert Cross, sen. of Chebacco of Ipswich, defendant.

In an action of the case for that the said John Burnam, as a trespasser for several late years improved a certain parcell of salt marsh of said Cross's, containing by estimation nearly thirty acres, lying at Chebacco aforesaid, and still keeps the plaintiff out of possession, to his damage one hundred pounds money, according to attachment dated 12th June, 1691; at which court the Jury found for the plaintiff the land in controversy, &c. from which the defendant appealed. The attachment, court's judgment and reason of appeal and evidences in the case being read and committed to the Jury, and are on file with the records of the Court. The Jury returned their verdict thereon, viz. They find for the Appellant, Reversion (reversal,) of the former judgment, and costs of Court.

[ACTION OF THE CASE.]

14. At a County Court held at Charlestown, Dec. 29, 1691.

Samuel Greene, both in behalf of himself, and as attorney to his brethren, viz. Nathaniel Greene, Edward Greene, and Thomas Greene, plaintiffs, *versus* Thomas Fox, defendant, in an action of the case, for that the said Thomas Fox withholdeth from the plaintiffs a house lott, now in his possession, being in the limits of Cambridge, containing half an acre, more or less, and is bounded, &c. of which Percival Greene, father of the plaintiff's father, John Greene, died seised, and left his relict, widow Ellen Greene, in possession; which said Ellen Greene the said Thomas Fox did marry, and in her right did possess the same until her death.

Both parties appeared, and joined issue in the case. The Court and Jury having heard and considered the pleas and evi-

dences respectively tendered, the Jury brought in their verdict for defendant, costs of Court. The plaintiffs appealed.

[ACTION AGAINST AN ABATOR.]

15. At a Court of the Assistants holden at Boston, March 21, 1691.

Richard Stratton, appellant,

versus

Hezekiah Gridley, defendant.

On appeal from a judgment of the County Court at Charlestown, in December, 1691, where said Hezekiah Gridley sued said Stratton for illegally possessing himself of an house and lands in Chelmsford, &c. which of right belonged to said Gridley's father, and which he died seised of as his own proper real estate, and recovered judgment against the appellant, title to the land in controversy, and costs of Court. The Court's judgment, &c. (as above,) being read and committed to the Jury, the Jury find for the defendant confirmation of the former judgment, and costs of Courts allowed £2. 8. 10. Execution issued for the costs, March 25, 1692.

[MORTGAGE. HUSBAND AND WIFE.]

16. At a County Court held at Cambridge, April 19, 1692.

Thomas Kendall, plaintiff, *versus* John Johnson, defendant, in an *action of the case*, for that the said Johnson and Bethiah his wife refuse to give the plaintiff possession of about 12 acres of meadow land, and about 2 poles of upland on the south side thereof, all which is situated in Woburn, and lieth, &c. which 12 acres was mortgaged to the plaintiff in a deed bearing date the 11th day of December, 1688, as by, &c. Both parties appearing, &c. The Jury brought in their verdict, finding for the plaintiff the mortgage forfeited, and possession of said lands therein contained and sued for, and costs of Court.

Execution went out for the above sued lands and costs, Ap. 29, 1692.

[OBJECTION TO FORM.]

17. At an Inferior* Court of Common Pleas holden at Charles-town, March 21, 1693.

John Quick, of London, and Elizabeth his wife, by their attorney, John Carthew, plaintiffs, *versus* William Cutter, defendant: In a plea of *trespass on the case*, for that the said William Cutter doth withhold and detain from the plaintiffs, in the right of the said Elizabeth, the possession of twenty acres of land, be the same more or less, bounded, &c. and of one messuage house, wherein the said William Cutter doth now inhabit and dwell, and one barn, garden, yard, and orchard, and also one water corn-mill and the appurtenances thereunto appertaining, &c. Both parties appearing, the plaintiffs were non-suited; *for that an action of trespass lieth not*† in this case. The plaintiffs appealed to the next Superior Court, &c.

[WRIT ABATED FOR WANT OF CERTAINTY.]

18. At an Inferior Court of Common Pleas held at Cambridge, Sept. 12, 1693.

John Quick, of London, and Elizabeth his wife, plaintiffs,
versus

William Cutter, defendant.

In an *action on the case* for that the said William Cutter doth withhold and detain from the plaintiffs the possession of one moiety or half part of twenty acres of land, be the same more or less, lying within the township of Cambridge. Both parties appearing, viz. John Quick and wife by John Carthew, *his* attorney, and said Cutter personally. The plaintiff was non-suited, the writ being abated by reason of the great uncertainty of the same.

* A new organization of the courts having taken place, under the PROVINCE CHARTER, this Court was opened at Cambridge, Oct. 4, 1692.

† This is the earliest case which has been noticed, of an *exception* to the form of the writ being allowed. The court considered it an *action of Trespass*, and not an *action on the case*.

[TRESPASS AND-EJECTMENT.]

19. At an Inferior court of Common Pleas, held at Charlestown, December 11, 1694.

The Inhabitants and Proprietors of Stow, plaintiffs, *versus* John Buttrick, defendant: In an *action of Trespass and Ejectment* for that the said John Buttrick, the defendant, refuses to deliver possession of one house or tenement built by the plaintiffs, for the use of the ministry of the said town of Stow, which said tenement is situated in said town of Stow; and although the said defendant hath been thereunto often requested, yet he still withholds the possession of the same from the plaintiffs, which is to their damage one hundred pounds.

The plaintiffs appearing, the defendant, though solemnly called, did not appear, but made default. It is therefore considered that the said Inhabitants and Proprietors of Stow do recover of the said John Buttrick the possession of the house or tenement sued for, and £2. 14. 9. costs of Court.

[ACTION AGAINST AN ABATOR. PLEA OF NON-TENURE.]

20. At an Inferior Court of Common Pleas, held at Concord,* July, 9, 1695.

John Lewis, Samuel Lewis, and Bryant Burd, who married Elizabeth Lewis, heirs of John Lewis deceased, plaintiffs, *against* John Greene, defendant, in an action of *trespass upon the case*, for that the said John Greene has illegally entered into, and withholdeth the possession of nine acres and a half of land, belonging of right to the plaintiffs, as heirs of their said father, John Lewis deceased, the same situate and lying and being in Malden in the county of Middlesex, bounded, &c. of which said nine acres and a half of land, with the appurtenances thereof, the said John Lewis, the father of the plaintiffs, died seised in fee; the illegal entering into and withholding possession whereof, is to the damage of the plaintiffs, at least fifty pounds. The parties appeared, (*the defendant pleading that he was not in pos-*

* The first Inferior Court at Concord was held on the second Tuesday of June, 1693.

ession,) joined issue in the case, which after a full hearing, &c. was committed to the Jury, who brought in their verdict therein, finding that the land in contest *was in the possession* of John Lewis deceased, and *now in the possession* of John Greene the defendant, and costs of Court.

[SPECIAL VERDICT.]

21. At the Superior Court of Judicature held at Charlestown, on the last Tuesday of July, 1698.

Samuel Annesley of the Parish of St. James in the city and Liberties of Westminster, Esq. and Mary his wife, one of the daughters and co-heirs of Capt. George Cooke, otherwise called Col. George Cooke sometime of Cambridge in the County of Middlesex, deceased, by their attorney, John Carthew of Boston, gent'n, Appellants,

versus

William Cutter of Cambridge aforesaid, house-carpenter, def. in *an action of the case*, for that the said William Cutter hath illegally entered upon, and withholdeth from the plaintiffs the possession of one moiety or half part of twenty acres of land, one messuage house wherein the said Cutter doth now inhabit and dwell, and one corn-mill, which said Land, Houses, Mill and premises were the real Estate of the said Capt. *alias* Col. George Cooke, of which he died sole seised in fee simple, and he dying intestate, the land, houses, mill, and all the privileges and appurtenances belonging thereunto, or any part or parcel thereof doth belong, and is the real estate of the said Samuel Annesley, and Mary his wife, in the right of the said Mary, and of John Quick of London, Cler. and Elizabeth his wife, in right of the said Elizabeth, which said Mary Annesley and Elizabeth Quick are the surviving children and co-heirs of the said Col. George Cooke, and parceners in his estate Real, whereof the premises is part: The one Moiety or half part whereof doth belong unto the plfs. falling to them by descent: Yet the said Cutter doth unjustly and injuriously withhold the premises from the plfs. whose right it is, and who have often demanded possession of the same; and is to the plfs. damage two hundred and fifty pounds in money, accord-

ing to writ bearing date, August 28th, 1697 : and at said Inferior Court, judgment was rendered for the Defendant for costs of Court.

Both parties now appeared by their Attornies, and the writ, Inferior Court's Judgment, Reasons of Appeal, Evidences, Pleas and Allegations on both sides being fully heard, the case was committed to the Jury, who were sworn according to law to try the same, and return their verdict therein upon oath, and found specially in the words following, viz. "We find produced an Instrument constituting Mr. Edward Collins as Attorney to make sale of the lands belonging to Col. George Cooke, which said instrument is subscribed with the name of Mary Cooke, with a seal, and with the names of Ann Baker and Mary Kettleby, the witnesses not sworn, or acknowledged by the subscriber. Also we find produced a receipt of an hundred and thirty pounds from Mr. Edward Collins, for land sold by Col. George Cooke, subscribed with the names of Mary Cooke, and witnesses John Trevett and Elizabeth Cooke. If therefore an instrument constituting an attorney to make sale under hand and seal, with witnesses subscribed, and neither the witnesses sworn, nor said instrument acknowledged by the subscriber before lawful authority, give him power legally to act as an attorney to pass land ; then we find for the defendant confirmation of the former judgment and costs of court ; if not, we find for the appellants the moiety of lands in controversy, according to writ, with Reversion of the former judgment, and costs of courts."

Upon mature consideration of the verdict aforesaid, the Court gave Judgment for the appellants. Therefore it is considered by the Court that the said Samuel Annesley and Mary his wife shall recover against the said William Cutter, the moiety of lands sued for according to writ, and costs of courts, taxed at seven pounds, nine shillings, and sixpense.

[FORMEDON. DEMURREE TO EVIDENCE. DISCLAIMER.]

22. At a Inferior Court of Common Pleas held at Cambridge, Sept. 13, 1698.

John Rowe, an infant, by his mother and guardian, Ruth Rowe, plaintiff, *versus* Daniel Woodward, defendant.

In an *action of trespass*, for that the said Daniel Woodward withholdeth and refuseth to deliver to the plaintiff, the Demandant, the possession of a certain piece or parcell of arable land, and pasture land, together with the edifices, buildings, houses, and appurtenances thereunto belonging, situate, lying, and being within the limits and bounds of Charlestown, butted and bounded, &c. which piece or parcell of arable and pasture land and premises, is a part of the lands which Elias Rowe, late of Charlestown aforesaid, mariner, deceased, in and by his last will and testament, proved, approved, and allowed, gave unto John Rowe, and unto his *heirs lawfully begotten of his body* forever, as more fully may appear by said last will and testament, reference thereto being had ; which, after the death of John Rowe aforesaid, unto John Rowe, the demandant, the son and heir of John Rowe, aforesaid, *ought to descend* by the form of the donation, which therefore, of right do belong unto the Demandant *as heir in fee Tail General*. The parties appeared, the defendant pleading a demurrer, by reason the will was not proved sooner ; the court notwithstanding overruling, and asserting the probate to be good, upon which the defendant disclaims. It is therefore considered by the court, that the said John Rowe, by his guardian and mother, Ruth Rowe, shall recover his title and possession of the said piece or parcell of arable or pasture land, together with the edifices and buildings, fences and appurtenances thereunto belonging, sued for as aforesaid, and costs of suit, and damages thirty eight shillings, and ten pence.

THE preceding extracts contain the *earliest Records* now remaining in *Suffolk* and *Middlesex*, of **ACTIONS FOR THE RECOVERY OF REAL PROPERTY**. And they clearly show, that notwithstanding jurisprudence had advanced to so high a degree of perfection in *England*, compared with other departments of learning, at the time OUR ANCESTORS emigrated, (a few years before the death of lord *Coke*,) they brought with them very little knowledge of the *principles and practice of the Law*, as it then existed in the parent country. There were indeed distinguished scholars among them ; but they were *Theologians* and not *Jurists*.

By the charter of *Charles I.* the *supreme power* was vested in a *Governor, Lieutenant Governor, and eighteen Assistants*, to be elected by the *Freemen*; who, with *the whole body of the freemen*, composed the *General court* of the corporation. But at the *first meeting* of the general court in 1630, all the *legislative and executive power* of the colony was *delegated* by the freemen to the *Court of Assistants*; who seem also to have exercised exclusive jurisdiction in all cases relating to the title to *real property*, until the establishment of the county courts.

In 1634, the freemen having become numerous, a change was made, by their electing *Deputies* to represent them. And the form of government thus established, continued without any material alteration, until the dissolution of the colony in 1691.

For several years after the settlement of the colony, it was governed like a numerous family of children or dependants. The Judges had recourse to no other authority than the *BIBLE*, "and when that failed them," says their historian, "they obeyed the natural reason which god had given them." Every thing was under the direction, or at least under the controlling influence, of the clergy. The administration of Justice was generally mild. But it was necessarily variable and arbitrary, and sometimes extremely severe.

County courts were established in 1639; but the records of their earliest proceedings have not been preserved. In 1644, jurisdiction was given to a single *Magistrate*, where the debt, trespass, or damage did not exceed forty shillings. This seems to be the origin of the jurisdiction of Justices of the peace, in *civil suits*, so general throughout our country; though still unknown in the system of *English* jurisprudence, where they have cognizance of crimes and penalties only.

The Charter of *William and Mary*, which was brought over by Sir *William Phipps* in 1692, contained some judicious provisions, for the administration of Justice in the Province. And when the courts were organized under it, the chief offices were conferred upon persons of much higher qualifications and standing in society, than most of those by whom they had been held under the former charter. In the beginning of the 18th century, the administration of justice had been considerably improved,

and the proceedings, (especially in actions for the recovery of real property,) assumed a somewhat more correct form. This improvement is chiefly ascribed to the efforts and influence of JOHN READ, who is represented as a man of uncommon talents, profound learning, and in every point of view the first lawyer in *Massachusetts*, in the early part of the last century. He made considerable exertions to introduce into the courts of the Province, the system of Law and Practice in Real Actions which is now established. With that view he prepared a number of PRECEDENTS, which are still extant under his name; and are much more technical than most of those that have been in common use.

In his endeavours to reform this part of the law, he was not very successful. He succeeded indeed in banishing from the courts *Actions on the case for the recovery of real property*; but he was unable to introduce writs of Entry in their place. And from his time, until several years since the commencement of the present century, though considerable improvement has been made in some of the other branches of the law, very little advancement is seen in this. The common remedies for the recovery of lands were sometimes denominated *Ejectments*, at other times *writs of Entry*; but in form most of them were *strictly* neither.

By some, these remedies have been considered a peculiar kind of action, unknown in the practice of the *English* courts; and they have been denominated *Actions of Ejectment in the nature of Real Actions*, in which the *freehold*, and not a *supposed term*, is recovered. It has accordingly been said,* that "the form of *Ejectment*, as it is called with us, is in two manners. It either *disproves* the title of the *deforciant*, and so establishes the title of the demandant, on the want of right of the tenant; or 2d. The demandant shews his own title, and on proof thereof, if a good one, has judgment." Perhaps there is no great objection to this view of the subject. It seems, however, to imply, that the departure from the ancient forms of real actions was the result, not of accident, but design. But we have no hesitation in

* See *Am. Precedents*, 3d. ed 345, 346.

saying, that every one who shall examine the only authentic history of our jurisprudence, the records of our judicial courts, will be satisfied that the change was wholly occasioned by the want of learning and skill in those who introduced it, and their indistinct notions of the law upon this subject.

Upon the accession of that distinguished jurist and scholar, the late CHIEF JUSTICE PARSONS, to the highest judicial office in the state, he made great and successful efforts to reform the practice in this department of the law. And under his auspices a system was happily commenced, which has already, under the administration of his learned associates and successors, nearly attained the maturity of the other parts of our jurisprudence.

INDEX.

☞ The numbers between brackets refer to the APPENDIX.

- Abatement of the freehold*, 52.
 remedy for, by entry, 64.
 ancient remedy by action, 152.
 how stated in the writ, 135.
of the writ, count, or suit, 170.
 by death of parties, 94, 188.
 by marriage, 94, 188.
 as to part only, 330.
pleas in, 178, 186, 192.
 when to be filed, 191, 192.
 after *imparlance*, 98, 99.
 for defective service of writ, 87.
 in writs of Dower, 274.
- Abator*, descent from, *tolls* an entry, 65, 66.
 action against, 152, 154, [392.]
- Abridging* the demand in the count, 177.
- Absence*, when an excuse for not entering, 65.
- Absolute* property, 165.
 estate in fee simple, 296.
 title tried in a writ of Right, 330.
- Abutals* of land, 134.
- Acceptance* of an estate, estoppel by, 35.
- Accidental loss*, damages for, 349.
- Acknowledging deeds*, design of, 261.
 does not dispense with proving, 261.
- Account* of profits by mortgagee, 41, 42.
- Acquiescence*, presumption from, 209.
 effect of, as to title, 210.
- ACTIONS.** *Droitural*, 83.
Possessory, 83.
Real, nature and incidents of, 83.
 of different grades, 80.
- ACTIONS, *Real***, how commenced, 87, 89, 174.
 difficulty and delays of, 15, 54.
 ancient remedy by, 83.
 strictness of form in, 54.
 varied according to the injury, 83.
 obsolete in *England*, 55.
 service of writs in, 89.
 must be by *Sheriff*, 90.
 limitation of, 7, 136, 322.
- Personal*, how commenced, 89.
- Mixed*. *Assize*, 161.
- Ancestrel*, 153.
- Actual** entry, 21, 26, 37.
 disseisin, 4.
 possession, 42.
 seisin, 2.
 by construction of law, 167, 327.

- Actual* entry and exclusive possession, 44, 45.
- Admeasurement* of Dower, writ of, 268.
- Administration*, granted in another state, 233.
- Administrator*, may discharge or foreclose a mortgage, 233.
may recover lands set off on execution, 243, 244.
(Administrator) sale of lands by, 167, 168, 232.
- Admission*, by pleading the general issue, 205.
- Ad communem legem*, writ, 128, [399.]
- Ad terminum qui prateriit*, writ, 129, 157, [400.]
- Affinity*, statement of in the writ, 138, 142, 327.
- Age* of parties in a real action, 99.
- Aggregate* corporation, action by, 149.
- Agreement* to an entry, 46.
- Aid* of the king, 96.
of a common person, 95.
not allowed to a wrongdoer, 96.
- Aid-prayer*, 95.
when to be put in, 97.
not confined to real actions, 95.
by him who could not *vouch*, 120.
in writs of Right, 330.
seldom used in our practice, 97.
- Alien*, entitled to dower, 259.
(Alien) who is considered, 179, 180.
may defend his title to land, except against the sovereign, 179.
may take by purchase, 179.
- Alienage*, plea of, 178, 179, 180, [414.]
- Alienation*, forfeiture by, 8.
by the lord's tenant, 113.
by tenant in fee simple, conditional, 296.
- Alienation* in fee, by tenant for life, 156, 157.
during infancy, 159, 160.
- Alienee*, writ of Entry against, 196.
- Allegation* of seisin, 135, 137, 138.
in a writ of Right, 327.
of taking esplees, 136.
in a writ of Right, 327.
- Allegiance*, 179.
- Alteration* of common law of descents, 61.
- Amendment* in pleadings, 187.
of verdict, 219.
- American* continent, claim to, 60.
States, diversity of practice in, 59.
- Ancestor*, who is, 142.
seisin by, 36, 37.
actions upon disseisin of, 135, 136.
cannot bind his heir, without binding himself, 118.
- Ancestral* actions, 153.
- Ancient* modes of transferring lands, 1.
law of warranty, 169.
remedy for abatement, by action, 152.
for an ouster, 52, 83.
- Apparent* right of possession, 84.
defect of a writ, 85.
- Appearance*, 87.
what defects of process waived by, 90.
- Apportionment* of conditions, 28.
- Appurtenances*, 135.
- Arrangement* of things in a writ, 86.
- Arrears* of Rent, demand of, 29.
of mortgage, how ascertained, 239.
- Ascendants* inherit by our law, 142.
- Assent* to an entry, 46.
- Assets*, Real, by descent, 122.
Personal, 231.
mortgages are, 231.

- Assets**, Personal estates *pur auter vie* in England, 141.
- Assigned already**, plea of, in dower, 278, [432.]
- Assignee**, writ of Intrusion by, 128.
 may have covenant, but cannot vouch, 121.
 of Lessee, action against, 157.
 of Mortgagee, action by, 227, 230.
 of Mortgagor, and foreclosing, 40, 234.
 of reversion, action by, 158.
- Assignment** of an equity of redemption, 234.
 of an estate, 113.
 of a reversion, 158.
 of Dower, by writ, 273.
 by Court of Probate, 269.
- Assize**, action of, 15, 80, 134.
 writ of, 91, 126.
 is a mixed action, 161.
 by whom maintained, 162.
 invention ascribed to Glanville, 161.
 different modes of taking, 162.
 of Dower, 85.
 of Mortancestor, 153.
 of Novel disseisin, damages in, 346, 349.
- GRAND**, nature of, 127.
 trial by, 334.
 challenge in, 335.
- Assurances**, common, 10.
- At large**, taking an Assize, 163.
- Attachment**, writ of, 89, 174.
 of property, in real actions, 90, 174.
- Attainder** prohibited, 260.
- Attorney**, entry by, 48.
- Audit et visu patris**, 126, 127.
- Auncestrel**, Homage, 111.
- Auter vie**, estate of inheritance, *pur*, 141.
 assets in England, 141.
 tenant *pur*, 141.
- Authority**, to sell land for payment of debts, 167, 168.
 not required, to make an entry, 26.
 except by bailiff, for rent arrear, 26.
- Averment**, of seisin, 135, 137, 138, 327.
 of taking esplees, 136, 327.
- Ayel**, writs of, 128, 153.
 damages in, 347.
 B.
- Bail**, not required in real actions, 89.
- Bailiff**, of lord's court, writ to, 316.
 lessee formerly considered, 116.
- Bar**, to claim of dower, 261.
 by former recovery, 79.
 Pleas in, 187, 192.
 in Assize, 162.
 Dower, 276.
 Formedon, 81, 307.
 writ of Right, 331.
 pleading over, in, 184.
- Bargain and sale** of lands, 12, 30.
- Bargainee** cannot take to another's use, 13.
 is seised without an entry, 19, 48.
- Bargainor**, when considered a feoffor, 12.
- Baron and Feme**, entry by or for, 46.
 seisin by, how stated, 139.
- Bastardy**, plea of, 201.
 trial of, 201.
- Battle**, trial by, 127, 333.
 is become obsolete, 334.
 grand assize intended to supersede, 343.
- Besayel**, writ of, 128, 153.
 damages in, 347.
- Betterments**, plea of, 202, 203, 204, [427.]
- Bill in equity**, by mortgagor, 164, 223, 225, 226.

- Bishop's certificate*, 201.
Bis petitum, 86, 134.
Blood, corruption of, 260.
Body corporate, action by, 149.
Bond, ancestor bound by, with his heir, 118.
Boundary line, 134.
Breach, of condition, 24.
 who may enter for, 25, 26.
 at what time, 26.
 of covenant in lease, 55, 116, 354.
 of mortgage, judgment for, 238, 289.
Buildings and improvements, claim for, 201, 202, 203, [427.]
 in dower, 286, 287, [433.]
Burrough English, dower in, 248.
 C.
Capacity of Executor, writ of Entry in, 243.
Capias or Attachment, 89, 174.
Casual ejector, 57.
Causa matrimonii prælocuti, writ, 158.
Ceremonies of making an entry, 47, 48.
 of transferring real property, 1.
Certificate of the Bishop, 201, 277.
Cestui que use is seised without an entry, 19, 20.
 trust, has no remedy on a mortgage, 41.
 (*Cestui que trust*) disseisin of trustee by, 17.
 vie, heir of may have a writ of Entry, 141.
Challenge of Essoin, 91.
 of Grand Assize, 335.
Champions in a writ of Right, 334.
Chancery, relief of lessees in, 56, 355.
 of mortgagors, 164, 223, 225, 226.
Change of writs of Right to writs of Entry, 127.
Charter, colony, 61.
 province, 62.
Chattels, leases for years considered, 115.
Chief Justice, teste of writs by, 89.
 Lord, holding of, 113.
Church-lands, entry upon, 26.
 alienation of, 146.
 action to recover, 141, 144.
Circuit Court of Common Pleas, 192.
Circumstances of the entry, stated in the writ, 129, 135.
Circumstantial evidence, 208.
Claim, where one cannot safely enter, 20.
 (Claim) continual, 20.
 must be made by one who has a right of entry, 20,
Claiming title, 42.
Clergyman, writ of Entry by, 141.
 on his own seisin, 165, 166.
Co-heirs entry by, 44.
 suit by, 93, 94.
Collateral heir, action by, 138.
 descent, statement of, 328.
 warranty, in a writ of Right, 332.
 has ceased in our law, 122.
Collusion, replication of, 207.
 of demandant and tenant, 97.
Colony, charter, 61.
Colour, in Assize, 163.
 in pleading, 200, 201.
Commencement of a suit, 89, 174.
 of an estate by wrong, 128.
 by right, 128, 129, 156.
Common essoin, 91.
 law the foundation of our jurisprudence, 59.

- Common Pleas**, writ of Right in, 316.
 recovery, 9, 109, 122, 123.
 plea of, in formedon, 309.
 tenants in, actions by, 172.
Comparison of titles, 208.
Conclusion of count in writs of Entry, 137.
 in writs of Right, 324.
Concurrent seisin or possession, 43, 341.
Condition, apportionment of, 28.
 who entitled to benefit of, 24, 25.
 part good and part void, 28.
 of re-entry for rent, 28, 29.
 entry for breach of, 24, 74.
Condition, entry, at what time, 26.
 in estates tail, 297.
Conditional estate in fee simple, 296.
 judgment on a mortgage, 227, 238.
 when not allowed, 241.
Confession of lease, entry, and ouster, 49, 57, 58, 78.
 has effect of an actual entry, 74, 78.
Consent rule, 58, 78.
 has the effect of an entry, 74, 78.
Consideration, in a deed, 14.
Constable cannot serve a writ of Entry, 90.
Construction of feudal grants, 112, 114, 115.
 of deeds, liberal, 12.
 of law, actual seisin by, 167, 327, 341.
Constructive possession, in trespass, 366.
Consummate tenant by the curtesy, 340.
Continual claim, 20.
 (Continual claim) must be made by one who has a right of entry, 20.
Continuance, 98.
 not of course, 99.
Contract of lessor and lessee, 115.
 for purchase of land, 204.
Conventio vincit legem, 120.
Conusee of a fine, 253.
Conveyance by demandant, plea of, 197, 198, [425.]
 with warranty, plea of, 308, [437.]
Conveyances, rightful or tortious, 9, 10.
 liberal construction of, 12.
 by matter of record, 20.
 (Conveyance) by public grants, 18, 19, 179.
 by legislative resolves, 19.
 by deed, perfected without entry, 18, 19, 20.
 with us, no cause of forfeiture, 9, 10.
Coparceners, suit by, 169, 170.
 inheriting as, 62.
 (Coparceners) in Massachusetts, may sue together or separately, 172.
Copy-holders, disseisin by, 7.
Coroner when to serve process, 90.
Corporation, action by, 149.
Corporeal hereditaments, 134.
Corruption of blood, 260.
Costs, in real actions, 187, 196, 197.
 not allowed at common law, 195.
 when writ abates by death, 189.
Co-tenant, possession by, 44.
Count, in real actions, 127.
 requisites of, 132, 133.
 should show where land lies, 85.
 in writs of Dower, 274.
 Formedon, 300.
 Right, 319, 324.
Counter plea, to aid prayer or receipt, 97.

- Counter plea*, to parol demurrer, 102.
 to view, 103.
 to voucher, 120.
 to warranty, 120.
- County*, entry or seisin limited to, 3, 45.
- Court*, Baron, writ of Right, 315, 316.
 of Chancery, relief to leasees in, 56, 355.
 of Com. Pleas, writ of Right, 316.
 of the United States, 59.
 of the Colony, 62.
- Cousinage*, writ of, 128, 153.
 damages in, 347.
- Covenant*, express, 117, 122.
 implied, 115, 122.
 real, doctrines of, 109.
 derived from warranty, 109.
 personal, annexed to the re-
 alty, 122.
 remedy by, 120.
 action of, substituted for
 vouchers, 109, 110.
 a preferable remedy,
 121.
 writ of, 55.
- Crown of England*, claim of to
 America, 60.
- Cui ante divorcium*, writ of, 129.
- Cui in vita*, writ of, 129.
- Curtesy*, estate by, in wild lands,
 37, 38.
 (Curtesy) not of lands assigned
 for dower, 252.
 what seisin of wife, to give,
 257.
 without actual entry, 340.
- Custom* of Burrough English,
 248.
 of Gavelkind, dower by,
 248.
- Customary* law of Normandy,
 248.
- Customs*, of German nations, as
 to dower, 246.
 D.
- DAMAGES** in real actions at com-
 mon law, 346.
- DAMAGES** Since the stat. of Glou-
 cester, 347.
 in ancestral writs, 347.
 when recovered by heirs,
 348.
 for accidental losses, 349.
 how estimated formerly, 349.
 increased or diminished by
 the Court, 350.
 not recoverable now, in real
 actions, 90, 196.
 except in Dower, 219.
 allowance for improvements,
 350, 351.
 for waste, pending a real
 action, 175.
- Danger* of joining many de-
 mandants, 173.
- Date* of writs, 89.
- Death* of demandant, plea of,
 189, [422.]
- (Death) of demandant or ten-
 ant, does not abate writ
 in Massachusetts, 94, 95,
 170, 173, 189.
 of demandant or tenant, in
 Dower, plea of, 289.
 abatement of real actions
 by, 172, 173.
- Debt*, payment or tender to mort-
 gagee, plea of, 236, [409.]
- Declaration* or count, requisites,
 132.
- Decree* in equity, relief by, 56,
 355.
 to stay Eject-
 ment, 82.
- Dedi et concessi*, effect of, 112,
 114.
- De donis*, statute, construction
 of, 297.
- Deeds*, liberal construction of,
 12, 13, 14.
 of conveyance require no
 entry, 19.
- (Deeds) consideration in, 14.
- (Deeds) of disseisee, void, 199.
 of *non compos mentis*, ef-
 fect of, 11.
- Default*, judgment by, 219.
- Defeasible* estates, 71.

- Defeasance*, mortgage by, 227.
Defeating an estate by entry, 28.
Defect of service, exception for, 90.
Defective statement of pedigree, 138.
 title, not cured by verdict, 218.
Deforcement, what, 53.
 effects of, 71, 72.
 remedy for, 129.
 how stated in the writ, 136.
Degrees in writs of Entry, 131, 147.
 in vouching, 119.
Delays in real actions, 90, 91, 92, 121.
Delivery of lease, to bring Ejectment, 57.
Demand of Dower, 272, 273.
 Rent, 27.
 when to be made, 27, 28.
 where to be made, 29.
Demandant, death of, plea, 189, [422.]
 marriage of, plea, 94, [422.]
 release by, 94.
Demesne, as of fee or freehold, 135.
Denise, in an Ejectment, 82, 359.
 and grant, imply a covenant, 116.
Demurrer, filing of, 192.
Demy-mark, tender of, 336.
Denial of title, by tenant, 2.
DESCENDER, Formedon in, 81, 295.
 Count in, 300.
Descent, of estates, 36, 61.
 deducing title by, 327.
Descents cast, entry tolled by, 6, 64, 65, 66.
 do not take away title to enter, 66, 67, 68.
Description of land sued for, 133, 134.
Detainer, forcible, 23.
Determinable estate, 156.
Determination of estate, writ founded on, 156.
Detinue of charters, writ of, 93.
 plea of in Dower, 280.
Devise, void unless devisor dies seised, 35.
 not defeated by fraudulent sale, 36.
Devisee seisin of, 73, 166.
(Devisee) entry of, not tolled by descent cast, 68.
Devisor, seisin of, 35.
 not evidence of seisin by devisee, 166.
Dilatory proceedings in real actions, 90, 91, 92.
 disallowed in our courts, 93.
Disability, pleas in, 178.
 writs arising upon, 158.
(Disability) of parties, does not abate writ in Massachusetts, 94, 95, 170, 173, 189.
Disaffirmance of reversioner's title, 2.
Disclaimer, plea of, to the writ, 185, 231.
 to the action, 176, 193.
 effect of at common law, 194.
(Disclaimer) by mortgagor, 231.
Discontinuance of estates, what is, 53, 69, 145.
 conveyances which work, 70.
 how caused, 69, 70.
 effects of, 71, 72.
 has ceased in our law, 70, 71.
 of suits in real actions, 80, 177.
Discontinuing an action, 80, 177.
Discretion of the courts, 99.
Disposition, different of real and personal property in England, 224.
Dispossession distinguished from disseisin, 68.
Disseisee, deed of, void, 199.
 lease by, 31.

- DISSEISIN**, what is, 1, 4, 16, 30, 53.
 or trespass, 43, 44.
 mere entry does not amount to, 63.
 transfers the fee by wrong, 5.
 title acquired by, 68, 69.
 when not qualified, 6.
 by one rightfully in possession, 7.
 (Disseisin) by continuance of possession, 203.
 by entry under a void conveyance, 10, 11.
 without knowledge of disseisee, 199.
 of uncultivated lands, 43.
 by co-heirs, 44, 45.
 by several jointly, 16, 176.
 (Disseisin) of mortgagor is disseisin of mortgagee, 33, 230.
 of tenant for life, by reversioner, 6.
 of trustee by *cestui que trust*, 17.
 actual, what is, 4, 15.
 effect, of, 5.
 necessary to toll an entry, 6.
 to acquire a freehold, 16.
 by election, 5, 6, 15, 17, 177.
 remedy for by entry, 64.
 trespass for, 219.
WRITS OF ENTRY SUR, 126, 128, 129, 130.
 damages in, 347
 in the nature of an assize, 130, 139.
 in the QUIBUS, 130, 145.
 application of, 138, 142, 143.
 examples, 143.
 PER, 131, 147.
 OR QUIBUS, 144.
 PER, and CUI, 131.
 OR QUIBUS, 144.
 POST, 131, 132.
 OR QUIBUS, 145.
- DISSEISIN**, a common remedy, 151.
Disseisor, who is deemed, 1.
 cannot qualify his own wrong, 5, 75.
 (Disseisor) cannot acquire a less estate than a fee simple, 5.
 [exception, 5.]
 lease by, 31.
 charge on lands by, 31.
 may endow one entitled to dower, 31.
 devise by, 32.
 is tenant of the freehold, 32.
Disseisors, joint, actions against, 172.
Distinction of injuries in writs of Entry, 77.
Distress infinite, process of, 88.
 for rent, 28.
 for services, 8.
 substituted for forfeiture, 8.
Distringas, to compel appearance, 88.
 for a jury to view, 104.
Disturbance, 52.
 of tenant for life disturbs the whole fee, 2.
Diversity of practice, in suits for land, 59.
Divorce, dower after, 258.
Dominion, exclusive over property, 165.
Donis, statute de, 297.
Dos de dote, not allowed, 252.
Double portions, 62.
DOWER, history of, 246.
 local customs, 248.
 in Gavelkind tenure, 248.
 Burrough English, 248.
 necessity of, 248.
 at common law, 249.
 (Dower) of what lands, 250, 251, 252, 259.
 (Dower) right of, not attachable, 288.
unde nihil requisites to, 256.
 marriage, 256.

- Dower**, seisin of husband, 256.
 death of husband, 258.
 after a divorce, 258.
 of what seisin by husband,
 250, 251, 253.
 for an instant, 252, 253.
 tortious fee, 253.
 joint estate, 254.
 of feoffee to uses, 253.
 estate in trust, 254.
 mortgage in fee, 254.
 (Dower) in equity of redemption,
 255, 256.
 Alienage no bar to, 259.
 Treason no forfeiture of,
 260.
 how assigned, 269, 282.
 in Probate court, 268.
 in courts of law, 270, 271.
 how barred, 261.
 by jointure, 264.
 by joining in a deed, 261.
 by accepting provision in
 the will of husband, 265.
 (Dower) cannot be released to
 husband during coverture,
 262, 265.
 prevented, how, 266.
PROCEEDINGS IN.
 demand, 272, 273.
 writ, 271, 273, 274.
 count, 273, 274.
PLEAS in abatement, 274,
 in bar, 276.
ne unques accouple, 276.
ne unques seisie, 277.
 husband living, 277.
 joint-tenant, 280.
 relinquishment, 279.
 elopement, 280.
 Verdict, 281.
 Judgment, 281.
Damages, where husband
 died seised, 282, 283.
 where husband had
 aliened, 283, 284.
 of what improve-
 ments, 284, 286.
 Writ of seisin, 287.
- Dower Assignment**, 279, 287,
 288.
 by metes and bounds, 288.
 death of parties before
 judgment, 289.
 waste prohibited, 289.
 warranty implied, 290.
Droitural actions, 83.
Duel, trial by, 127, 333.
Dum fuit infra etatem, writ of,
 129.
 non compos mentis, writ of
 129.
Duplicity of plea, 275.
Dwellinghouse, entry upon, 48.
 E.
Easement, action for land subject
 to, 165.
 (Easement) presumptive grant of,
 214.
Ecclesiastics, seised *jure ecclesiæ*,
 70.
 discontinuance by, 70.
Ejectione firmæ writ of, 55, 154,
 354.
EJECTMENT, history of remedy
 by, 55, 355.
 change of practice in, 56, 57,
 355.
 (Ejectment) not always a suffi-
 cient remedy, 59.
 right of entry required in, 57.
 former recovery no bar in, 81.
 form of, the same for all in-
 juries, 79.
 freehold not recovered in, 81.
 has superseded real actions
 in England, 55.
Ejector, casual, 57.
Election of remedies for an ous-
 ter, 77, 84, 143.
 disseisin by, 5, 15, 17, 177.
 to make an act, a disseisin,
 or trespass, 5, 6.
 of demandant, as to better-
 ments, 201, 202.
Elegit, tenant by, 162.
Elopement, plea of in dower, 280.
Endowment, ancient modes of,
 247.

- England*, claim to America, by, 60.
 real actions obsolete in, 54, 55.
- English courts*, ancient practice in, 87.
- Entails*, origin of, 297.
- Entire-tenure*, plea of, 184.
- ENTRY, ceremony of, 22, 23, 48.
 seisin acquired by, 18.
 what amounts to, 46.
 when an effectual remedy, 75.
- (Entry) lawful or unlawful, 76.
- (Entry) under void deed or will, is a disseisin, 10, 33.
 by husband or wife, 46.
 by an infant, 160.
 by attorney, 48.
 by a stranger, 26, 75.
 by lessee for years, 7, 47, 216, 217.
- (Entry) by tenant for life, 217.
 by co-tenants or co-heirs, 44.
 by grantee of reversion, 26.
 at what time, 26.
 by command of a stranger, 22.
 to receive seisin after judgment, 18.
 when sufficient without claim, 21, 22.
 without prior authority, 26.
 to another's use, 46.
- (Entry) may sometimes be, after writ of right is barred, 323.
- title of*, not tolled by descent cast, 66, 68.
 actual, when necessary, 21.
 by construction of law, 167.
 when to maintain a writ of Entry, 166.
 not to maintain Ejectment, 49, 74.
 resistance to, 47.
 extent of its effect, 45, 46.
 into a part of the land, 341.
 effect of, limited to the county, 45.
- ENTRY, for condition broken, 18, 24, 74.
 effect of, 28, 74, 75.
 defeats all rights and incidents, 28.
 when necessary, before action, 74.
 for non-payment of rent, 26.
- (Entry) for forfeiture, 216.
 to foreclose a mortgage, 33, 41, 226.
 to rebut a title, 74.
 to avoid the statute of limitations, 50, 69.
 to abate a writ, 188.
 under a deed, effect of, 45.
 puts an end to wrongful estates, 7, 8.
 to former ouster, 77.
- not required to perfect a deed, 19, 20.
- by mistake is no disseisin, 5.
- intent of to be regarded, 21, 22.
- toll'd by descent, after *actual* disseisin, 6, 64, 66, 67, 68.
- where no action lies, 73.
- right of, required to maintain Ejectment, 57, 143.
- limitation of, 7, 49, 69.
- Writs of, 125, 128, 129.
 of different classes, 127.
 degrees in, 131.
 count in, 132.
 describe the injury, 77, 79, 80.
 against joint disseisors, 172.
 changed to writs of Right, 127.
 damages in, 347.
 in the nature of an Assize, 130, 139.
 in the QUIBUS, 130, 145.
 application of, 138, 142.
 examples, 143, 144.
 in the PER, 131, 147.

- ENTRY**, Writs of, in the **QUIBUS**, 144.
 in the **PER** and **CUI**, 131.
 or **QUIBUS**, 145.
 in the **POST**, 131, 132.
 or **QUIBUS**, 145.
 a common remedy, 152.
 ad communem legem, 128, 156.
 ad terminum qui præteriiit, 129.
 to foreclose mortgages, 226, 228.
 by executor, for lands set off on execution, 243, 244.
 by one not named, plea of to the writ, 186.
 pending the action, plea of, 187.
 Forcible, 23.
 superseded writs of **Assize**, 163.
Equity, rule of respecting mortgages, 224.
 relief of lessee in, 56.
 of mortgagor, 223.
 of redemption, 165, 223.
 (Equity of redemption) attachment of, 231.
 sale of, on execution, 225.
 dower in, 255.
 conveyed by second or third mortgage, 234.
Error, by defect of the verdict, 217, 218.
Esplees, statement of, 133.
 seisin by taking, 136.
 distinctions with respect to, 326.
 how alleged in certain cases, 326, 327.
 in writs of **Right**, 326.
 chiefly regarded as evidence, 327.
Essoins, what, 87, 88.
 the several kinds, 90, 91.
 not allowed in **Assize**, 161.
Estate in lands, when revested without entry, 74.
Estate, wrongful, defeated by entry, 7, 8.
 divested by entry for condition broken, 24, 28.
 immediately defeasible, 71.
Estates-tail, origin and nature of, 297.
 discontinuance of, 69, 70.
 how barred by our law, 70, 71.
 for years, unknown in the Feudal law, 55.
 not the subject of warranty, 118.
 joint or in common, 183.
Estoppel, 11, 12, 34, 80, 179.
 (Estoppel) by acceptance of an estate, 35.
 (Estoppel) by deed with warranty, 11, 34, 35, 179.
 by disclaimer, 225.
 (Estoppel) by recital, 34, 35.
 by matter of record, 35.
Eviction, what, 110.
 fear of, 120.
 notice of to warrantor, 124.
 indemnity for, 110, 119.
Evidence, naked possession, 42.
 concurrent or exclusive possession, 43, 45.
 possession by co-tenant, 44.
 survey and marking lines, 43, 44.
 of seisin, in writs of **Entry**, 166, 167.
 in writs of **Right**, 338.
 within statute of limitations, 214, 215.
 under general issue in real actions, 198, 205.
 to entitle demandant to recover, 206.
 release, in a writ of **Right**, 342.
 documentary, defect of, 209.
 Presumptions, 208.
 their foundation, 212.
 pedis positio, 339.
 taking esplees, regarded as, 327, 339.

- Evidence* in writs of Entry, 205, 208.
 Right, 342.
 in action for mesne profits, 361, 373.
 of long acquiescence, effect of, 210.
- Exception*, by plea in abatement, 174.
 by motion, 174.
 for defective service, 90.
 when waived by appearance, 90.
- Exceptions* not favoured in Assize, 162.
- Exchange* of real property, 37.
- Exclusive* possession, 45.
 dominion over property, 165.
- Excuse* for non-appearance, 87.
- Executed* contract, lease considered, 115.
- Execution* of mesne process, 89, 90.
 final process, 220.
 levy of, upon land, 168.
 process of, 220.
 action for land set off upon, 169.
 in favor of executor, 244.
- Executor* cannot prosecute or defend in a real action, 173.
 power to sell land, 167, 168, 232.
 action by, on a mortgage, 226, 228.
 for land set off to him on execution, 243, 244.
 may discharge or foreclose a mortgage, 232.
- Expectancy*, estate in, 2, 297.
- Epiration* of a lease, action founded on, 157.
- Express* contract of lessor, 115.
 condition, 9.
 covenant, 117.
 warranty 114, 117, 118.
 annexed to conveyance of freehold, 118.
- Extent* of seisin acquired by an entry, 38.
- Extent* of an execution, 168.
- Extinguishment* of mortgages, 230, 237.
- F.
- Falsifying* a recovery, 116.
- Fear*, what an excuse for not entering, 21.
- Fee*, disturbance of, 2.
 in expectance, 297.
 limited after a fee, 298.
 simple, absolute or conditional, 296.
 tail, origin and nature of, 297.
- Feme covert*, entry by, 49.
 saving in favor of, 49, 65.
 entry of husband for, 46.
- Fencing*, effect of, 44.
- Feeffee* to uses, wife of not entitled to dower, 253.
- Feeffment*, ancient mode of transfer, 1.
 in presence of the *pares*, 3.
 nature of the ceremony, 4.
 necessarily transfers the freehold, 8.
 not in use with us, 10.
 implied warranty confined to, 118.
- Festinum remedium* by assize, 161.
- Feud*, alienation of, 8, 113.
- Feudal* relation of lord and tenant, 111.
 investiture, 1, 2, 113.
 tenures, 109, 112.
 law, peculiar features of, 8, 101.
 restraints of, 222.
 forfeitures by, 8, 259.
- Feudal* doctrines, rejected here, 59, 62.
 warranty, a consequence of tenure, 111.
 could not be restricted, 117.
- Feudatory*, obligations of, 111.
- Feudum militare*, 99.
- Fictions*, in Ejectment, 57, 58.
 in writs of Right, 315.

- Fictitious* proceedings, objection to, 58.
- Fine* alienation by, 9.
not in use here, 10.
entry to bar, 73.
- Fishery*, grant of may be presumed, 212.
- Flatts*, action to recover, 165.
- Forcible entry*, 23.
effect of, 23.
and *detainer*, process of, 23.
superseded writs of *Assize*, 163.
- Foreclosing* mortgages, 38, 226.
time of, 40.
- Forfeiture*, by alienation, 8, 10.
what conveyances create, 9.
not to affect an innocent purchaser, 8.
by denial of reversioner's title, 2.
of lands for crimes, 260.
(*Forfeiture*) entry for, 216.
- FORMEDON*, writ of, 291.
of three kinds, 292.
lies for any property that may be entailed, 294.
limitations of, 295.
incidents of this action, 294.
no entry required to maintain, 167.
against *pernors* of the profits, 292.
statement of gift and title, 294.
in the *DESCENDER*, 295.
special writs of, 298.
count in, 300.
allegation of *seisin*, 302.
of *esplees*, 302.
in the *REMAINDER*, 304.
when the proper remedy, 304.
proft when required, 306.
allegation of *esplees*, 306.
in the *REVERTER*, 302.
count in, 303.
lies at common law, 303.
pleas in *abatement*, 307.
- FORMEDON*, *pleas*, *puis darrein continuance*, 307.
in *bar*, 307.
general issue, 307.
special, *fine levied*, 309.
feoffment and warranty, 308.
release or confirmation, 308.
voucher and warranty in, 309.
judgment in, 310.
mesne profits in, 312, 313.
establishes title only from the recovery, 312.
- Former* judgment in real actions, 79.
recovery in, 81.
no bar in *Ejectment*, 81.
- Forms* of ancient writs, 125.
- Fourching* by *essoins*, 92.
- Franchises*, disturbance of, 15.
disseisin of, 15.
recoverable in *Assize*, 162.
- Frank-marriage*, 296.
- Fraudulent* feoffments, 182.
- Free socage*, charter of *Massachusetts* colony, 61.
- Freehold*, conveyance of, 1, 2.
acquired by actual *seisin*, 16.
demanded in all real actions, 86.
recovered by writs of *Entry*, 164.
not by an *Ejectment*, 81.
defeated by entry for condition broken, 24.
tenant of, 86.
title to, how determined by *Ejectment*, 56.
- Full age* in real actions, 99.
- Futuro*, freehold in, 18.
- G.
- Gage* and safe pledges, 88.
- Gavelkind* tenure of, 61.
entails of, 299.
dower by custom of, 248.

- General** imparlance, 98.
 special imparlance, 98.
 issue, in writs of Entry, 193.
 what admitted by pleading, 205.
- Germans**, dower among, 246.
- Gift** of lands, feudal, 112,
 in frank-marriage, 296.
- Give**, when a personal warranty, 115.
 and *grant* effect of the words, 112.
- Grades**, different of real actions, 80.
- Grand assize**, 127.
 trial by, 334.
 challenge of, 335.
 cape, 87.
- Grantee** of lands in feudal tenure, 112.
- Grantor**, obligation of to warranty, 112.
- Grants**, after stat. of *Quia emptores*, 113.
 when to be presumed, 212.
 (Grants) to or by an infant, 161.
 (Grants) public, effect of, 18, 19, 179.
- Great assize**, 127.
 trial by, 334.
- Guardian** in *chivalry*, Dower lies against, 271.
 in *socage*, lies not against, 272.
 to spendthrifts, 159, n.
 feudal, entitled to profits, 101.
- Guardian**, action against by ward, 298.
- Habeas corpus**, in view, 104.
- Habere facias possessionem**, 56.
 seisinam in writs of Entry, 220.
 in writs of Right, 344.
 entry to execute, 18.
- Habitation**, right of, 354.
- Heir**, title of, how stated, 138, 327.
- Heirs**, are seized in *law* before entry, 2.
 lineal or collateral, 169.
 actions by, 169, 170.
 may join in suit, or sever, 170.
 damages recovered *by* in writs of Entry, 348.
 against, 348.
 writ of Entry by, 135, 140.
 in the *PER*, 149.
 writ of Intrusion by, 128, 155.
 writ of Right by, 320.
 demand of Dower against, 272, 273.
 writ of Dower against, 272, 273.
 of him who was *actually* seized, 36, 37.
 how liable, on warranty of ancestor, 111, 112.
 when bound by warranty of ancestor, 122.
 rebutted by warranty of ancestor, 118.
 without assets, 122.
 cannot be bound, *without* the ancestor, 118.
 have no concern with *personal* estate, 225.
- Hereditaments**, corporeal, 133.
 incorporeal, 134.
- High treason**, corruption of blood for, 260.
- Highway**, action to recover, 165.
- History** of Ejectment in England, 54, 355.
 of real actions in Massachusetts, 351.
- Holding land** of the chief lord, 113.
 by feudal services, 112, 113.
 with or without homage, 112, 113.
 over by tenant, 72, 73.
 by virtue of possession and improvements, 202.
- Homage ancestral**, 111.
 obligation of lord who received, 111.

Homage charged all lands by descent, 111, 112.

Human nature, its infirmity the ground of presumptions, 213.

House, demand of rent at, 29.

Husband, entry of *for* wife, 46.
for *by* wife, 46.

(Husband) dower cannot be released to, during coverture, 262, 265.

joint-tenant, wife of, not dowerable, 254.

tenant by the curtesy, writ of Entry by, 139.

still living, plea of in dower, 277.

(Husband,) death of, pending real action against husband and wife, does not abate the writ, 173.

and wife, statement of seisin by, 139.

writ of Entry by, 136, [389.]

I.

Ideot, limitation as to, 49, 65.

Immediate feoffee or donee of disseisor, 65.

alienee, trespass against, 367.

Immovable property, 133.

Impar lance, general, 98.

special, 98.

most special, 98.

Implied covenant, 115, 122.

how restricted, 117.

warranty, 112.

by feoffment, 118.

in dower, 290.

Imprisoned persons, limitation as to, 49.

Improvements, holding by virtue of, 202.

allowance for in real actions, 350, 351.

Incidents of real actions, 90, 318.

of writs of Right, 335.

Aid prayer, 95.

Essoins, 90.

Impar lance, 98.

Incidents Parol demurrur, 100.

Receipt, 97.

Summons and severance, 93.

View, 102.

Voucher, 95, 109, 121, 122.

Incorporeal rights, disturbance of, 15.

hereditaments, 134.

not divested or restored by entry, 49.

Increased value by improvements, 202, 203, 204, 218, 220.

in cases of dower, 284, 286.

Incumbrances on land, 110.

Indefeasible title not necessary to recover, 165.

Indemnity for eviction, 110.

Indictment for forcible entry, 24.

Individual right of inheriting, 169.

Indorsement of writs, 90.

Infancy, privileges of, 49, 99.

when not allowed, 100.

disabilities of, 99.

entry during, to revest estates, 160.

Infant, entry for, 46.

(Infant) grant to or by, 161.

entry by, 49, 65, 160.

after coming of age, 160.

feoffment by, 160.

remedy for alienations by, 160.

may bring what actions, 99.

Infirmity of human nature, ground of presumptions, 213.

Inheriting, right of, 169.

Injunction to stay waste, 174.

ejectment, 82.

against lessor, 56, 355.

Injuries to real property, 53.

amounting to an *ouster* or not, 53.

statement of, in writs of Entry, 77, 135.

Intent, effect of as to an entry, 21, 47.

as to an *ouster*, 46.

Intestate, mortgage to, 232.

- Intruder*, not within st. 32, H. 8. c. 33, 65.
 (Intruder) descent from, tolls entry, 66.
 action against, 155.
Intrusion upon the freehold, 53.
 remedy for by entry, 64.
 writs of, 128, 154, 155, 156.
 or in the *quisbus*, 146.
Investiture of lands, 1, 2.
 of feuds, 113.
Issues, distraining by, 88.
Jewish code, 61.
Joinder of parties in real actions, 93.
 hazard of, 173.
Joint disseisin, 176.
 disseisors, actions against, 172.
 holding, admission of, 177.
 tenancy of husband, plea of in dower, 280.
 tenant, possession by, 44.
 wife of, not entitled to dower, 254.
 (Joint) tenants, in Massachusetts, may sue jointly or severally, 172.
Joint-tenure, plea of, 182, [416.]
Jointure, what will bar dower, 264.
JUDGMENT in writs of Entry, 219.
 has relation to the plea, 197.
 against demandant, effect of, 321.
 how far conclusive, 79, 321.
 (Judgment) may be rendered for less land than is demanded, 219.
 over, against vouchee, 119.
 in Dower, 281.
 in Ejectment, confers no title to the freehold, 81.
 in Formedon, 309, 310.
 in writ of Right, 344.
 by default, 219.
 conditional, on mortgage, 227, 238, 242.
 of course, when entered, 220.
Judiciary of the U. States, 59.
- Jurisdiction* of Sup. Court of the United States, 59.
Jurors to view, 103, 104.
 to form the grand Assize, 334.
Jury should pass on all the points in issue, 217.
 (Jury) not to be polled at request of a party, 218.
 duty of, as to improvements, 218.
 presumptions by, 208, 212.
 trial by, 217.
 view by, 104.
 in our practice, 105.
Jus duplex, or *droit droit*, 319.
 possessionis, not sufficient in a writ of right, 319.
 or *proprietas*, 319.
Justice, delay of in real actions, 121.
 requires seller to state defects of title, 110.
 K.
Kindred, lineal or collateral, 142.
King, praying aid of, 96, 121.
King's charter to *Massachusetts colony*, 61.
 province, 62, [462.]
 grant confers actual seisin, 18.
Knights of the grand assize, 334.
 L.
Laches, what is considered, 65.
 when excused, 21, 50.
Lands, effect of entry upon, 1.
 in different counties, 3, 45.
 set off on execution, 168.
 description of in writ of entry, 133.
 grant of, when presumed, 212.
 recovery of, when sold by executor, 167.
 when set off, upon ex'on, 224.
 when mortgaged, 226.

- Lands** over in value against the *vouchee*, 119.
- Ministerial**, alienation of, 146.
- Law**, ancient, of real actions, 54.
modern, frequent change of, 59.
of descents, 61.
of warranty, 109.
- Lease**, cannot be made by one who is disseised, 30.
delivery of, to try an Ejectment, 57.
to mortgagee, effect of, 40.
entry and ouster, rule to confess, 57, 58, [452.]
and release, creates no forfeiture, 9.
- Leases**, how considered in feudal times, 55, 115.
now a mutual covenant, 116.
- Legal estate** of Mortgagee, 229, 230.
of assignee of a mortgage, 257, 229, 230.
- Legislative resolves**, conveyance by, 19.
- Lessee for years**, entry by, 47, 216, 217.
action against, 158.
formerly regarded as a bailiff, 116.
- Letters patent** confer an actual seisin, 18, 340.
testamentary, profert of, 233.
- Levy** of an execution, seisin by, 168.
- Lex fori**, governs limitation of actions, 50.
- Lex rei sitæ**, 59.
- Liberal** construction of conveyances, 12.
- License** to sell land for payment of debts, 210, 211.
gives a naked power, 167.
- Life**, estate for, 2.
tenant for, holding over, 72, 73.
- Limitation** of entry, 7, 49, 50, 51.
saving for disability, 49, 50.
of writs of Entry, 7, 136.
Formedon, 295.
Right, 7, 136, 361.
and settlement act, plea of, 229, 201, [427.]
stat. of, need not be pleaded, 215.
does not bar title of entry, 66, 67, 216.
of express warranty, 114.
(Limitation) of actions to recover land sold under license, 210, 211.
depends on the *lex fori*, 50.
of real actions by sole corporations, 166.
- Lineal** kindred, 142.
- Livery of seisin**, how made, 4.
in one of several parcels, 340.
not required where title is by record, 20.
in deed, 4.
in law, 18, 19, 20.
- Local**, all real actions are, 85.
- Longissimus ingressus**, what, 127.
- Lord**, obligation of, on eviction of tenant, 111.
and tenant, mutual obligation of, 111.
- Lord's court**, writ of right in, 316.
lease to vassal, how considered, 55.
- Lunatics**, entry by, 49.
- M.**
- Maintaining** demandant's writ, 182.
- Maintenance**, danger of, 25, 29.
how avoided by entry, 57.
- Manor Court**, writ of Right in, 315, 316.
- Mark**, demy, tender of, 336.
- Marriage**, proof of, 277.
settlement by jointure, 264.

- Marriage*, abatement of writ by, 94, 170, 171, 188.
 (Marriage) in Massachusetts, does not abate writ, 95, 170, 188.
Massachusetts, colony charter, 61.
 jurisprudence, 154.
 province charter, 62.
Mediate feoffee or donee of disseisor, 65.
Mere right, 85.
 in question by writ of Right, 342.
Mesne Profits, remedy for, 219, 220, 346.
 by trespass *quare clausum fregit*, 361.
 action for, when introduced, 356.
 considered an equitable action, 374.
 after recovery in Ejectment, 357.
 necessary consequence of it, 359.
 by nominal plaintiff, 358.
 against co-tenant, 358.
 under tenant, 359.
 grantee of disseisor, 367.
 limitation of, 361.
 in our practice, restricted, 366, 367.
 what sufficient evidence to maintain, 361.
 no *general rule* established, 370.
 lies not, where no right of entry, 370.
 or betterments ascertained, 371.
 damages how estimated, 367, 372.
 not restricted to *income*, 373.
 money cannot be paid into court in, 361.
 allowance for taxes and repairs, 374.
 for permanent improvements, 374.
Message may be demanded, 133.
- Metes and bounds* in assignment of Dower, 288.
Minister, alienation by, 146.
 (Minister) real actions by, 141, 144, 165, 166.
Ministerial lands, recovery of 141, 144.
Minority, privileges and disabilities of, 99.
Minors, suit by for socage lands, 99.
Misapprehension as to title, 212.
Mise on the mere right, 331, 333, 371, 373.
Misstatement of cause of action, 80.
 of title, 328.
Mistake, entry by, no disseisin, 5.
 does not excuse a trespass, 5.
 not to prejudice one's rights, 43.
 as to extent of one's titles, 212.
 not to be presumed, 212.
Mixed actions, 161.
Momentary seisin, effect of, 75, 142, 143.
 may change the remedy, 76.
 will not maintain a writ of Right, 326.
Mortancestor, assize of, 80.
 damages in, 347.
 writ of, 128.
Mortgagee, entry by, 38.
 before breach, 39.
 lease to, effect of, 40.
 estate of, determined by payment, 164.
 judgment for, 238.
 to account for rents, 39, 41, 42.
 disseisin of, *by election*, 229.
 (Mortgagee) is trustee for holder of note secured by mortgage, 231.
 (Mortgagee) purchase of mortgaged premises by, 41.
 death of, before foreclosure 231.
 heirs of cannot enter or sue, 232.

- Mortgagee*, of remainder or reversion may foreclose, 228.
- Mortgages*, origin and history of, 222.
 rule of equity respecting, 244.
 second and third, effect of, 234.
 of distinct closes, 234, 240.
 (Mortgages) on several conditions, 240.
 of remainder or reversion, 41.
 trustee of, 233.
 dower in, 255.
 usurious, defence to, 235.
 go to executors, 225.
- (Mortgages go to executors) exception, 225.
 discharge of, 223.
 forfeiture of, 223.
- (Mortgages) extinguishment of, 230, 237.
 entry to foreclose, 38, 226.
 action to foreclose, 226, 227, 228, 229.
 by assignee, 229.
pleadings in actions on, 235, 236.
judgment in, conditional, 227, 238, 242.
 unconditional, 241, 242.
- Mortgagor*, retaining possession, 229.
- (Mortgagor) disseisin of, is disseisin of mortgagee, 230.
 considered tenant at will, 229.
 re-entry by, 40, 41.
- (Mortgagor) disclaimer by, 230.
 notice to, of entry to foreclose, 39.
 remedy of, at law, 164.
 in equity, 164, 223.
- Muniments* of title, difficulty of preserving, 213.
 N.
- Naked* power, license to sell land is, 167.
 possession, 42, 83.
- Naked* right, descent of, 102.
- Narratio*, or count, 127.
- Naturalization* entitles to dower, 260.
- Ne dona pas*, plea of, 307, [436.]
- Ne unques accouple*, plea of, 277, [430.]
- Ne unques seisie*, plea of, 277, [431.]
- Nolle prosequi*, when allowed, 177.
- Non compos mentis*, entry by, 49, 65.
 remedy for alienation by, 158.
- (Non compos mentis,) under guardianship, deed of, void, 11.
 not under guardianship, deed of, Conveys a seisin, 11.
- Non dedit*, plea of, 307, [436.]
- Non devisavit*, plea of, 308, [442.]
- Non disrisivit*, plea of, 193, [423.]
- Nonsane memory*, remedy for alienations by persons of, 158.
- Non-tenure*, plea of in abatement, 175, 180, 181, 307, [414.]
 bar, 193, [424.]
- Normandy*, customary law of, 247.
- Normans*, dower among, 246.
- Notice* to tenant in Ejectment, 57.
 to warrantor of eviction, 124.
- Notoriety* of transfer of title, 20.
 of adverse occupancy, 43.
- Novel disseisin*, Assize of, 91, 126, 161.
 damages in, 346, 349.
- Nul disseisin*, plea of, 193, 205.
- (Nul disseisin) right of entry to be proved under, 207.
- Nuper obiit*, writ of, 153.

O.

Oath of Sheriff on view, by a jury, 106, [413.]
of the grand assize, 335.

Occupancy, adverse, 43, 44.
limits of, 342.

Offices, disseisin or disturbance of, 15.
recoverable in Assize, 162.

Order of naming things in a writ, 86.

Original writs in real actions, 87.

in *Massachusetts*, 89, 174.

Ouster of the freehold injuries amounting to, 52.
of particular tenants, 216.
what constitutes, 43.
evidence of, 43, 45.
by resisting lawful entry, 75.
when not presumed, 45.

Oyer of a mortgage, 227.
of a deed in writs of *Formedon*, 306.

P.

Panel of the grand Assize, 336.
of jurors to view, 104.

Parcel non-tenure as to, 181, 330, [415.]
abatment as to, 181, 330.

Parceners, suits by, 169, 170.
considered as *one* heir, 169.
analogy, of our descents to, 170.

Parent, succeeded in the feud by his eldest son, 169.

Pares curiæ, attestation by, 3.
comitatus, feoffment in presence of, 3.

Parish, seisin in right of, 144, 145.

occupation of church lands by, 165, 166.
alienation without consent of, 146.

Parliament, warranty established by, 112.

Parol demurrer, 100, 101.
without plea, 102.

Parol demurrer, not allowed in assize, 161.

disallowed here, 162.

Parson, alienation by, 146, [382.]
writ of Entry by, 141, 144.

Parsonage lands, alienation of, 146.

Particular estate, alienation of, 156.

(Particular) estate, cannot be created by claim or entry, 6.
tenant, ouster of does not disturb the remainder, 216.

Parties to an action, cautions respecting, 93, 173.
to a deed may modify their covenants, 117.

Patent, letters conveyance by, 18, 19.

writ of Right, 319.

Payment of a mortgage, 239.

Peace, time of what, 137.

Pedigree, how stated in writ, 138, 328.

Pedis positio, evidence of, 339.

Peers of the county, 3.

of the court, 3.

PER, writ of Entry in, 131, 147, [383.]

who may bring, 148.

by heir, 149,

[384, 385.]

by successor, 149.

PER and *CUI*, writ of Entry in, 131, 149.

by heir or successor, 149.

Permanent occupancy, 44.

Pernancy of profits, replication of, 182.

when not evidence of *ouster*, 44.

Personal actions, all of one grade, 80.

obligation to warranty, 112.

warranty by the word *give*, 115.

covenant, 122, 123.

representative entitled to mortgages, 225.

- Pews**, real or personal property, 133, n.
- PLEA** in writs of *Entry*, 178.
abatement, 178, 186, 192.
alienage, 178, 179, 180, [414.]
disclaimer, 185, [418.]
non-tenure, 175, 180, [414.]
joint-tenure, 182, [416.]
sole or entire, 184, [419.]
several tenure, 184, [419.]
in a writ of right, 329.
seisin by a different ancestor, 186.
entry by a different person, 186, [420.]
requisites of, 190.
filing of, 191.
- in bar*, 187, 191.
general issue, non disseisavit, 193, [423.]
what admitted by, 205.
non tenure, 193, [424.]
disclaimer, 193, [424.]
bastardy, 201.
with colour, 200, 201.
conveyance by demandant, 197, 198.
tenant seised, till disseised by the demandant, 200.
limitation and betterment, 201.
- puis da rien continuance*, 187, 201, 342.
entry by demandant, 187, [421.]
death of demandant, 188, [422.]
recovery by a stranger, 207.
marriage of feme sole, 188, [422.]
ouster, pending the writ, 207.
- in writs of Dower*, 274.
abatement, 275.
in writs of dower, in bar, 276.
in writs of Formedon, 307.
abatement, 307.
in writs of bar, 307.
- PLEA** in writs of Right, 331.
abatement, 329.
bar, 331.
in action or mortgage, payment, 236. [409.]
tender, 236, [409.]
usury, 236, [409.]
- Pleading over* in bar, 162.
- Pleadings*, amendment of, 197.
- Pleas of land*, writs of *Entry* are, 133.
- Pledges* for appearance, 88.
- Pone*, removing writ by, 315.
- Point* of the assize, 162.
- Positive* evidence, 208.
- Possessio fratris*, 341.
- POSSESSION**, actual, 42, 366.
concurrent, 43.
exclusive, 45.
constructive, 366.
naked, 42, 83, 213.
right to, 43, 319.
apparent right to, 84.
with claim of title, 213.
presumed lawful, 213.
acquired by wrong, 131.
withheld by wrong, 131.
of mortgagee, 40.
of one co-tenant, 44.
evidence of rightful occupancy, 213.
vacant, or in one acknowledging the title of devisee, 73.
- (Possession) of termor, is possession of remainder-man or reversioner, 73.
presumptions arising from, 213.
estates in, 2.
freehold in, 2.
and improvements, holding by, 202.
writ of, 56.
- Possessory** actions, 126.
recovery in, 84.
title, triable in Ejectment, 56, 57.
right trial of, 55.
- Possibility**, before the statute *de donis*, 297.

- (Possibility) coupled with an interest, is devisable, 36.
- Post, writ of Entry in*, 131, 132.
 when to be brought, 150.
 by heir or successor, 151.
 form of the count, 151, [389.]
 used in suffering a recovery, 151.
- Power* to sell land by an executor, 167, 232.
 is a naked power, 167.
- Practice*, in suits to recover lands, 59.
 early, in Massachusetts, 62, [447.]
 of vouching warrantor, 123.
- Præcipe quod reddat*, 87.
- Præsee in aid*, how proceeded with, 96.
 essoin by, 92.
- Predecessor* and successor, 26, 165.
- Premises*, description of in writ of Entry, 133.
- Presumptions* of grants, 212, 214.
 within 20 years, 214.
 of greater estate than is claimed, not allowed, 212.
 of intention to commit a wrong, 44.
- Presumptive* evidence, 208.
 from long acquiescence, 209, 210.
 of title co-extensive with claim, 212, 213.
 rebutted by contrary presumptions, 213.
 analogous to statute of limitation, 214.
- Pretended* titles, granting of, 25.
- Preventing* Dower, modes of, 266.
- Primogeniture*, 61, 169.
- Privies* of right, 26.
- Privileges* of infancy, 100.
- Privity* of estate, 122.
 of interest, 211.
- Probate court*, assigning Dower in, 269.
- Process* in real actions, 87, 317.
 in our practice, 88.
- Prochein ami* to indorse writs, 90.
- Proclamations* in real actions, 87.
- Profert* in a plea of joint-tenure, 183.
 of release with warranty, 308.
 in a writ of Formedon, 306.
 of letters testamentary, 233.
- Profits*, mesne, action for, 220, 346.
 of mortgaged estate, 39, 42.
 taking of, as a distress, 28.
- Proof*, what sufficient in a writ of Entry, 206.
- Property*, real, injuries to, 52.
 different dispositions of here, and in *England*, 224.
- Protection*, not allowed in assize, 161.
 to one purchasing under license of court, 211.
- Province of Massachusetts*, charter of, 62.
 early practice of courts in, 62, [447.]
- Public grants*, effect of, 18, 19, 179.
- Puis darrien continuance*, pleas, 187, 201, 206, 342, [421.]
- Pur autre vic*, tenant, 141.
 seisin by, how stated, 141.
 estate of, descendable, 141.
- Purchase*, rebutting of claim by, 122.
- Purchaser*, rebutting heir by, 122.
 at executor's sale protected, though the court exceeds its authority, 211.

Q.

Quare ejecit infra terminum
writ of, 55, 354.

Quia dominus remisit curiam,
writ of Right, 315.

Quia emptores, statute of, 113,
117.

Quia timet, warrantia chartæ,
120.

QUIBUS, writ of Entry in, 130,
[377.]

a common remedy, 138.

examples of its application,
143, 144.

Quiet enjoyment, covenant for,
117.

Quod clamat esse jus suum, 134.

Quod ei deforciat, writ of, 321.

R.

Rationabili parte, writ of Right,
153.

Real Actions, ancient remedy
by, 83.

are *pleas of land*, 133.
strictness of form in,
54.

delays in, 15, 54, 63.
obsolete in *England*,
55.

retained in Massachu-
setts, 63.

(*Real Actions*) in Massachu-
setts, not abated by death
or disability of parties,
94, 95, 170, 189.

practice made simple,
63.

property, what considered,
133.

ancient modes of trans-
ferring, 1.

Rebutting the heir, 192.

evidence of seisin, 198.

by a warranty, 118.

Receipt, proceedings in, 97.

Recital, estoppel by, 34.

Record, conveyance by, 20.

(*Record*) estoppel by, 35.

Recompense in land of vouchee,
121.

Recovery, common, 109.

nature and effect of,
322.

not used here as a con-
veyance, 10.

in *value* against vouchee,
109, 119.

always in fee simple, 119.

of a *freehold*, discharged of
a term, 116.

Rector, alienation by, 144, 146.

writ of Entry by, 144,
[386.]

Redemption of mortgages, 39, 40.

Re-entry, condition of, 28.

reservation of right of, 25.
only to feoffor, donor, &c.
25.

not assignable, 25.

for non payment of rent,
26.

and *penalty*, reservation of,
27.

Register, great variety of writs
in, 125.

adapted to every injury,
125.

Registry of deeds, notoriety by,
20.

Relation of lord and tenant, 111.
in trespass, 362, 366.

Release with warranty, plea of,
308.

(*Release*) construed to be any
conveyance which may
pass estate, 13.

by tenant in a real action,
94, 172.

by demandant in a writ of
Right, 342.

Remainder, Formedon in, 304.

in lands, when let in by for-
feiture of particular ten-
ant, 8.

Remainder-man, seisin of, 73.

entry by, 72, 73.

action by, 166, 167.

praying in aid, 120.

not effected by ouster
of particular tenant,
216.

- Remainder-man**, may take advantage of a forfeiture, 8.
- Remedies** for an *ouster*, 54, 63.
 changed by entry, 76.
 for recovery of land, variety of, 59.
 when by writ of Right, 81.
- Rent**, demand of, 27.
 when, 27, 28.
 where, 27.
 implied covenant to pay, 116.
 re-entry for non-payment, 26.
 at what time, 26.
 demand to precede it, 27.
- Rents and profits** of mortgaged estate, 39.
 mortgagee to account for, 39, 42.
- Replication** to plea of disclaimer, 197.
 sometimes omitted, 195.
 that *nothing passed* by the deed, 193, [426.]
- Republication** of a will, 36.
- Repugnancy** in stating title, 328.
- Reservation** of rent on condition, 27.
 of right of re-entry, 25.
 of re-entry, with penalty, 27.
- Resolve of legislature**, conveyance by, 19.
- Restoration** of seisin, 64.
- Return** of process, 87.
- Reversion**, after an estate tail, 297.
 assignee of, action by, 157, [398.]
 when let in by forfeiture, 8.
- Reversioner**, writ of Intrusion by, 128.
 may be prayed in aid, 120.
 denial of title of, 2.
 when may take advantage of a forfeiture, 8, 10.
- Reverter**, Formedon in, 302.
 lies at common law, 303.
- Right** of possession and property, 319.
 without seisin not transferable, 29.
 may be released, 29.
 of entry, necessary to bring Ejectment, 57, 78, 79.
 and action for mesne profits, 370.
- (Right of entry) not devisable, 36.
 of entry for breach of condition, not assignable, 25.
 to easements, presumption of, 212.
- WRIT of, its nature, 314.
 last resort for an *ouster*, 314, 322.
 the only real action now used in *England*, 55.
 when necessary, 314.
 changed to a writ of Entry, 126.
 lies only for a fee simple, 314, 319.
 after a writ of Entry, 81.
 concurrent with writ of Entry, 321.
 how commenced, 316, 317, 329.
 ancient practice in, 315.
 use of revived in *England*, 317.
 what seisin required, 320, 326.
 founded on *mere right*, 326.
 in the court *Baron*, 315.
 removal to common Pleas, 315.
 considered a commission to the lord, 328.
- Quia dominus remisit curiam*, 315.
- Patent**, where brought, 316.
 against several tenants, 328.
- Close**, nature of, 319.
 requisites to maintain, 319.

- Right**, writ of, count in, 319, 324, [443.]
 what must be alleged, 320.
 seisin in *fee and right*, 325.
 allegation of esplees, 325.
 deducing title, 327.
 dilatory proceedings in, 317.
 aid prayer in, 330, [410.]
 absolute right decided in, 330.
Pleas in abatement, 329.
 in bar, 331.
 special, seldom used, 331.
Issue upon the *mere right*, 332.
 evidence under, 332.
Joining the mise, 333, [445.]
Trial in, 338.
 by a common jury, 333.
 by grand assize, 334.
 by battle, 333.
 champions, 334.
Incidents and delays in, 335.
 tender of *demj mark*, 336.
Evidence, upon the *mere right*, 333.
 of seisin and esplees, 339.
 pernanacy of profits, 342.
Verdict, form of, 342.
Judgment, form of, 344.
 writs in *nature of*, 315.
de rationabili parte, 153.
Rightful conveyance, 9, 10.
Rightful occupancy, 42.
Rights, incorporeal, disturbance of, 15.
 to easements, presumption of, 212.
 S.
Sale of lands by executors, 167, 232.
SEISIN, how acquired, 1, 18.
 commencing by right, 129, 156.
SEISIN of lands by wrong, 5, 129.
 in fact or in law, 2.
transferred rightfully, 4.
 by wrong, 4.
revested by entry, 6, 64, 76.
 acquired without entry, 18.
livery, of, how given, 4.
 to what extent acquired, 42.
 for an *instant*, 75, 142, 143.
 will not maintain a writ of right, 326.
 may change the remedy, 76.
 by taking esplees, 136.
 actual or expectant, 2.
 actual by construction, 365, 167, 341.
 in possession or remainder, 2.
 (Seisin) of remainder or reversion, 167.
 several, joint, or in common, 2.
 cannot be concurrent, 43.
 of corporeal property only, 15.
 (Seisin) of incorporeal property, must be *actual*, 49.
 of husband, to entitle wife to dower, 251, 256.
 of wild or vacant lands, 37.
necessary, to convey the estate, 29.
 to devise it, 35.
 to transmit by descent, 37.
 of devisee, 73.
 of mortgagee, 227.
 of demandant, writ upon, 135, 139.
 of ancestor, writ upon, 134, 140.
 of predecessor, writ upon, 141.
 how stated, 135.
 as of fee and right, 319.
 as of fee, 135.
 as of freehold, 135.
 denial of by plea, 331, [445.]
Sesina facit stipitem, 36.
 not in Connecticut, 38.

- Seizure* of land forfeited, 8.
- Service* of writs in real actions,
87, 89, 174.
must be by sheriff or his
deputy, 90.
- Services*, feudal, 112.
- Several-tenure*, in writ of Entry,
176, 185.
in writ of Right, 329.
- Set-off*, in action for mesne prof-
its, 374.
- Severalty*, estates in, 176.
seisin in, 2.
mortgages in, 234.
- Sheriff*, to serve writs in real ac-
tions, 90.
- Showers* to the jury who view,
104, 106.
- Sickness*, *essoin* of, 91.
- Socage* tenure, of colony charter,
61.
parol demurrer in, 101.
- Sole or entire tenure*, plea, 184.
in writs of entry,
184.
in writs of Right,
329.
- Special* bail in real actions, 89.
demurrer for misstatement
of seisin, 139, 140.
Imparance, 98.
matter of evidence in writs
of Right, 342.
plea of *non-tenure*, 180,
[415.]
- Specific* relief to lessees, 56, 355.
- STATUTES, ENGLISH.
- 20 H. 3, ch. 1, Merton 282.
ch. 8. 322.
- 52 H. 3, ch. 16, Marlbridge 346.
ch. 30, 173, 132, 150.
- 3 Ed. 1. ch. 17, Westminster
1st. 91.
ch. 39, 323.
ch. 43, 92.
ch. 44, 91.
- 4 Ed. 1. ch. 6, 112.
- 6 Ed. 1. ch. 1, Gloucester 346.
ch. 10, 92.
- 13 Ed. 1. ch. 1, Westminster 2d.
295.
- 13 Ed. 1. ch. 4. 321.
ch. 34, 266.
ch. 47, 130, 140.
ch. 48, 103, 272.
- 18 Ed. 1. *Quia emptores*, 113,
117.
- 34 Ed. 1, *De conjunctim
feoffatis* 184.
- 25 Ed. 3. ch. 6, 181, 330.
- 1 R. 2. st. 2. ch. 9, 182.
- 4 H. 4. ch. 7, 182.
- 12 Ed. 4. ch. 12, 272.
- 1 H. 7. ch. 1, 292.
- 21 H. 8. ch. 15, 116.
- 27 H. 8. ch. 10, 244.
- 32 H. 8. ch. 1, 248.
ch. 2, 323.
ch. 22, 70.
ch. 33, 65, 68, 312.
- 1 Eliz. ch. 15, 70.
- 13 Eliz. ch. 10, 70.
- 18 Eliz. ch. 14, 294.
- 31 Eliz. ch. 3, 87.
- 21 Jac. 1. ch. 16, 46, 49, 69, 295.
- 4 & 5 Anne, ch. 16, 51, 69, 104.
- 3 G. 1. ch. 25, 104.
- 14 G. 2. ch. 20, 141.
- 10 G. 3. ch. 50, 88.
- STATUTES OF MASSACHUSETTS.
- 1782, ch. 11. § 6, (Abatement)
191.
- 1783, ch. 24. § 8, (Dower.) 265.
ch. 36. § 4, (Dower.) 251.
ch. 37. § 4, (Deeds.) 20.
ch. 38. § 7, (Spendthrifts.)
159, n.
ch. 39. § 6, (Writs.) 90.
ch. 40. § 1, (Dower.) 72,
272, 273, 282.
§ 2, (Dower.) 289.
ch. 44, (Coroner.) 90.
ch. 52, (Suits by heirs.)
170, 172.
- 1784, ch. 28, (Writs.) 89.
ch. 28. § 7, (Damages.)
281.
ch. 28. § 9, (Costs.) 344.
ch. 28. § 11, (Indorsing
writ.) 89.
- 1785, ch. 22. § 1, (Mortgage.)
227, 238.

- 1785, ch. 22. § 2, (Mortgage.) 38.
 ch. 62. (Joint estates.) 183, 254.
 ch. 62. (Suits by heirs.) 93, 170, 172, 183.
 ch. 69. § 3, (Dower.) 258.
 1786, ch. 13. (Limitation.) 323.
 ch. 13. § 4, (Limitation.) 65, 69, 295.
 1788, ch. 51. (Mortgages.) 225.
 ch. 51. § 3, (Executors, &c.) 244.
 1789, ch. 2, (Double portion,) 62.
 1791, ch. 17, (Reviews.) 322.
 ch. 60, (Estates tail.) 70, 122.
 1792, ch. 17. (Service of writs.) 90.
 1795, ch. 53, (Pews.) 183, n.
 ch. 75, (Service of writ.) 89, 175, 274.
 ch. 75. § 2, (Disclaimer.) 176, 194, 196.
 ch. 75. § 3, (Waste.) 175.
 1797, ch. 50. (Service of writs.) 87, 90, 192, 174, 274.
 1798, ch. 77. § 1, (Mortgage.) 38.
 1805, ch. 90. (Tenant *pur auter vie.*) 136, 141.
 ch. 90. § (Dower.) 251.
 1807, ch. 75. § 1, 2, (Limitation.) 136, 188, 165, 323.
 ch. 75. § 3, (Betterments.)
 ch. 75. § 3. (Betterments.) 221, 371, 375.
 1809, ch. 84. (Betterments.) 202, 246.
 1811, ch. 33, (Common Pleas.) 192.
 1812, ch. 94. (Alien. Dower.) 259.
 1816, ch. 84, (Dower.) 263.
 1817, ch. 83, (Waste. Injunction.) 175, note.
 ch. 190. § 12, (Sale by license of court.) 210.
 1818, ch. 60, (Spendthrifts.) 159, n.
 1819, ch. 144, (Improvements.) 202.
 1820, ch. 53, (Reviews.) 322.
 ch. 54 § 1, (Dower.) 270.
 ch. 79. (Common Pleas.) 192.
 1823, ch. 146, § 2, (Release of dower.) 261.
 1824, ch. 52, (Presumptive grants.) 214.
 1826, ch. 70. (Abatement of writs. Pleadings.) 94, note, 170, 171, 173, 188, 189, 307, 381.
 1828, ch. 120. (Abatement of writs.) 95, note, 188.
 ch. 137, § 1. (Actions by ministers.) 165, 172, 173, 174.
 ch. 137. § 4, (Pleading. Costs.) 180, 182, 186, 187, 191, 196, 307, 320.
 ch. 137, § 5. (Writs of Dower.) 272, 276.
 ch. 137. § 7. (Judgment on Mortgage.) 242.
 STATUTES OF MAINE.
 1821, ch. 47, (Improvements.) 202, note.
 ch. 62. § 6. (Deed. Disseisin.) 10.
 1822, ch. 186, (Curtesy.) 173, note.
 1826, ch. 344. (Pleading.) 205, note.
Stipitem, seisinam facit, 36, 38.
Strangers to title, when not privileged, 210, 211.
Stultifying one's self. 159, note.
Subinfeudation, introduction of, 112.
 how prevented, 113.
Substitution of a tenant, 113.
Successor, action by, 141.
 entry by, 26.
 writ of Intrusion by, 128.
Sufferance, estate at, 72, 73.
 tenant by, 72, 157.

- Suit*, how commenced, 89, 174.
 termination of, 221.
- Summons*, process by, 87, 89, 174.
 and severance, 93.
 no longer lies, 170.
ad warrantizandum, 119, 123.
ad auxiliandum, 96, 120.
- Survey* and marking lines, 43, 44.
- Survivorship*, 254.
- T.
- Tacit warranty*, 110.
- Tail* estates, discontinuance of, 70.
 how barred by deed, 70, 71.
 abolished in effect, 122.
 tenant in, cannot maintain a writ of Intrusion, 155.
- Taking* esplees, 136.
- Tenant* in common, action by, 172.
 possession of, 44.
 (Tenant in common) by prescription, 176, 177.
 by wrong, 176, 177.
 at sufferance, 72, 73.
 in tail, remedy for, 155.
- (Tenant) for years, entry by, restores estate of remainderman, or reversioner, 7.
- (Tenant) for life, entry by, 217.
 in a real action must have a freehold, 86, 175.
 feoffment by, effect of, 7.
 in possession, disseisin by, 7.
 liable to action by mortgagee, 233, 234.
 notice to, in Ejectment, 57.
 joint or in common, 182, 183.
 joint, wife of cannot have dower, 254.
- Tenants*, several in writ of Right patent, 329.
- (Tenants) in common, in Massachusetts, may sue together or separately, 172.
- Tender of demy mark*, 336.
 plea of, on mortgage, 236, [409.]
- Tenement*, import of, 183.
- Tenure*, feudal, 112.
 does not exist here, 2, 59.
 disturbance of, 2.
 between lessee and reversioner, 114.
 of Gavelkind, 61.
 of Burrough, English, 248.
- Term*, not recoverable formerly, 55, 56.
 defeated by recovery of the freehold, 116.
- Termination* of a suit, 221.
- Terminus qui prateriit*, entry *ad*, 129, 157, [400.]
- Terror*, holding over by, 120.
- Tertenant*, scire facias against, 101.
- Teste* of writs, 89.
- Things real*, recoverable by a writ of Entry, 132, 183.
- Time* of peace, what, 137.
- Title*, repugnance in stating, 328.
 of entry not tolled by descent, 12, 67.
 muniments of, difficulty of preserving, 213.
 indirectly tried in Ejectment, 56.
 not determined in action on mortgage, 233.
 acquired by disseisin, 68, 84.
 indefeasable, 165.
 mistake as to, 43.
 comparison of, by trial, 203.
- Tolt*, removal of writ of Right by, 315.
- Tortious* conveyance, 10.
- Transfer* of real property, 1.
- Transverse* line of descents, 328.
- Treaty* of 1794, [Jay's], 179, 180.
- Treble* damages for waste, 175.

Trespass without notice, no disseisin, 44.

action of, by heir against abator, 363.

against grantee of disseisor, 367.

for mesne profits, 219, 346, 361.

with a *continuando*, 363.

by relation, 362, 366.

by creditor who has levied an execution, 169.

Trial in writ of Right, 333.

Troubles, in the civil law, what, 110.

Trustee of mortgagee, 233, 239.
wife of cannot have dower, 253.

(Trustee) disseisin of, by *cestui que trust*, 17.

U.

Ultimate fee simple, 98.

Ultimum refugium, 322.

Uncultivated lands, conveyance of, 20.

disseisin of, 43.

Undertenant, action for mesne profits against, 359.

Unsettled lands, conveyance of, 20.

descent of, 37.

Use, distinct from the freehold, 353, 354.

upon a use, not allowed, 13.

Uses, statute of, seisin by, without entry, 19.

covenant to stand seised to, 10, 13, 14.

Usufruct, right to, 110, 354, 398.

Usurious mortgage, 235.

V.

Variance, 139.

Variety of legal remedies, 59, 79.

Verdict in real actions, 217.

in Dower, 281.

in writs of Right, 342.

finding improvements, 218.

nonsuit after, 80.

Verdict, estoppel by, 80.

does not cure defective title, 218.

(Verdict) amendment of, 219.

defective averments cured by, 218.

View, by the tenant, 102.

counter plea to, 103.

by the jury, 104.

in what actions, 104.

in England, 104.

in Massachusetts, 105.

oath of sheriff in, 107.

Visu et auditu patris, 127.

Vouchee, essoin by, 92.

how called to warranty, 119.

might vouch over, 119.

Voucher, what, 95, 109.

remedy by, 119.

fallen into disuse 109, 121, 123.

Vouching in our practice, 123.

over by vouchee, 119.

Vouchor must have the whole estate, 120.

W.

Waiver of breach of a condition, 24.

(Waiver) of a right to foreclose by virtue of an entry, 39.

of defect of process by appearance, 90.

Warrantia chartæ, 93, 117.

quia timet, 120.

now obsolete, 122.

Warrantizo, 118.

Warranty, ancient law of, 109.

of feudal origin, 111.

feudal unalterable, 117.

a part of every civil code, 110.

nature of, in the *Roman law*, 110.

express, 111, 114, 118.

implied, 112, 115, 117.

in dower, 290.

in deed, 110.

in law, or tacit, 110.

for life only, 115, 118.

personal, during life, 115.

- Warranty**, with or without assets, 122.
 feudal confined to seoffment, 118.
 when an estate tail is created by the word give, 115.
 when any freehold is so created, 115.
 (Warrants,) defeats the title of the heir, 71.
 does not bind a *right of entry*, 12.
 not a title under a term of years, or title of entry, 12.
 annexed to any conveyance of a freehold 118.
 not to an estate for years, 118.
 collateral does not exist in our law, 123.
 remedy for by voucher, 117.
 by warrantia chartæ, 117.
 how pleaded to a writ of right, 332.
 counterpleading to, 120.
Waste by tenant in dower, 249.
Waste, action of, by co-heirs, 94.
 pending a real action, 174, 175.
 and vacant lands, conveyance of, 341.
Water, action for land covered with, 133, note, 165.
Widow, when entitled to dower, 249.
 on eviction from jointure, 264.
 how barred of dower, 261.
 accepting provision in husband's will, 265.
 (Widow) entitled to a third part of rents until dower is assigned, 283.
Wife may enter for husband, 46.
 may enter by husband, 46.
 when entitled to dower, 249.
 how barred of dower, 261.
 accepting provision in husband's will, 265.
Wife evicted of jointure, to have dower, 264.
Wilderness, conveyance of, 20, 341.
Wilful withholding evidence, 209.
Will, when effectual, 35.
 republishing of, 36.
Witnesses to an entry, 48.
Writs, great variety in the Register, 125.
 forms enacted by statute, 89.
 how to be signed, 89.
 how to be indorsed, 90.
 in real actions, how served, 87.
 of *Ayel*, 128.
Besayel, 128, 153.
Causa matrimonii prælocuti, 158.
 Cousinage, 128.
Cui in vita, 129.
Cui ante divortium, 129.
Dower, 126, 271, [428.]
 against whom brought, 86.
Dum fuit infra ætatem, 129, 153.
Dum fuit non compos mentis 129, 153.
Ejectione firmæ, 56, 154, 354.
Entry, 126.
 different classes of, 127.
 degrees in, 131, 146.
 applicable to the particular injury, 79.
 in the *QUIBUS*, 130, [377.]
 in the nature of an Assize, 130, 139.
WRITS OF ENTRY, sur disseisin, 130.
 in the *PER*, 131, 147, [383.]
 who may bring, 148.
 heir, 148.
 successor, 149.
 in the *PER* and *CUI*, 131, 149, 151, [386.]
 by heir or successor, 149.

- WRITS OF ENTRY** in the post, 132, [389.]
 when brought, 150.
 by heir or successor, 151.
 form of the count, 151.
ad communem legem, 129, [399.]
 or in the *quisus*, 128.
ad terminum qui præterit, 129, 157.
 peculiar conclusion of, 157.
to foreclose a mortgage, 226, 229.
 by executor, for land set off upon, execution, 243, 244.
 of *Formedon*, 291, [435.]
Intrusion, 128, [396.]
Mortancestor, 128.
Quare eiecit infra terminum, 55, 354.
Quod ei deforciat, 321.
Right, 126, 314.
 close, 319.
 patent, 319.
 lies after a writ of Entry, 81, 84.
- WRITS OF ENTRY**, the only real action now used in England, 55.
 difficulties attending, 58.
Wrong, nature of, stated in real actions, 132.
Wrongful estate may become indefeasable, 7, 84.
Wrongfully acquired, seisin, 4, 128.
 withheld, 129.
Wrongs amounting to an ouster, 52.
 cannot be qualified by disseisor, 5, 6, 75.
 not to be presumed, 44.
 Y.
Year, complete, 21.
 and day, claim within, 20.
Years, lessee for, action against, 129, 158.
 tenant for, formerly considered a mere bailiff, 116.
 entry by, 7, 48.
 action against, 158.
Yielding and paying, construed a covenant to pay rent, 116.

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